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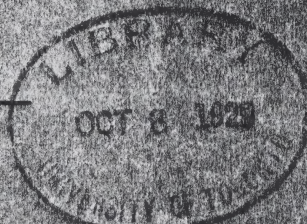
Judicial Proceedings

*respecting*

Constitutional Validity of  
The Industrial Disputes Investigation  
Act, 1907

and

Amendments of 1910, 1918 and 1920



*Toronto Electric Commissioners*

*v.*

*Snider et al*

OTTAWA  
F. A. ACLAND  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY

1923







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OTTAWA

F. A. ACLAND

PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
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# CONSTITUTIONAL VALIDITY

## OF

### THE INDUSTRIAL DISPUTES INVESTIGATION ACT, 1907

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#### INTRODUCTION

The Industrial Disputes Investigation Act, 1907, having been, on January 20, 1925, declared *ultra vires* of the Federal Parliament by the Judicial Committee of the Privy Council, it has been thought desirable to print a brief history of the circumstances which resulted in the judicial proceedings, together with the texts of the decisions of the Ontario courts and of the Judicial Committee of the Privy Council in England, also of the argument before the latter body.

The litigation arose as the result of the refusal of the Toronto Electric Commissioners to recognize the authority of a Board of Conciliation and Investigation established under the Industrial Disputes Investigation Act to deal with a dispute between the commissioners in question and certain of their employees being linemen, groundmen and others concerned in the work of power transmission and distribution and being members of the Canadian Electrical Trades Union, Toronto branch.

The application for the establishment of a Conciliation Board was made by the employees, the dispute being over a demand for increased wages and changed working conditions. A board was fully constituted, the member representing the employer being named, however, by the Minister of Labour in the absence of a nomination from the Toronto Electric Commissioners, who had protested against the formation of a board.

The board met in Toronto during the month of August, 1923. Application was made to the Supreme Court of Ontario by the Toronto Electric Commissioners for an injunction order to restrain the board from proceeding with its inquiry on the ground that it was not within the jurisdiction of the Dominion Parliament to apply the Industrial Disputes Investigation Act to municipal employees or to enact laws affecting civil rights.

The application of the Toronto Electric Commissioners was heard by Mr. Justice Orde, of the High Court Division of the Supreme Court of Ontario, and an interim injunction was granted on August 29, 1923, restraining the board from interfering with the business of the commission and from exercising any of the powers conferred on such a board by section 38 of the Industrial Disputes Investigation Act, thus limiting it to an investigation of a voluntary nature. The judge based his decision on the ground that the Act "purports to interfere in the most direct and positive manner with the civil rights of employers and employees and also with the municipal institutions of this province, both subject-matters of legislation exclusively assigned to the provinces."

Application for a permanent injunction against the Board of Conciliation and Investigation was subsequently made by the Toronto Electric Commissioners and the case was heard by Mr. Justice Mowat, who delivered his judgment on December 15, 1923. Mr. Justice Mowat, pointing out the omission from the British North America Act of the subject of industrial disputes and labour organizations as an indication of the change in industrial conditions since 1867, took the view that, because of the interpro-

vincial character of labour organizations and industrial disputes, "provincial lines are obliterated and the provinces, not having the free and instant communication with each other, or for concert, could ill avert Dominion-wide trouble. The simple local strikes which alone could have been in contemplation of the Fathers of Confederation in 1864 and 1867, have given place to those of brotherhoods composed in some instances of hundreds of thousands, and Dominion-wide in their operations and probably beyond the resources of each province to deal with." Dissenting from the decision of Mr. Justice Orde, who was co-ordinate in authority with him, Mr. Justice Mowat, therefore, referred the case to one of the appellate divisions of the Supreme Court of Ontario. The judgment of the latter court, delivered by Mr. Justice Ferguson on April 22, 1924, and concurred in by Chief Justice Mulock and by Mr. Justice Smith and Mr. Justice Magee, was in favour of the defendants and upheld the constitutionality of the Industrial Disputes Investigation Act. Mr. Justice Hodgins dissented and was of opinion that judgment should be entered for the Toronto Electric Commissioners.

The majority of the court took the view that, while certain sections of the Act trench upon property and civil rights and authorize the board to inquire into industries that are in some cases local works carried on by municipalities, yet, "according to the 'true nature and effect of the enactment,' 'its pith and substance,'" the legislation is not law in relation to municipal institutions, local works, property and civil rights, matters purely local as these words are used in section 92 of the British North America Act, "but is legislation to authorize and provide machinery for conducting an inquiry and investigation into industrial disputes between certain classes of employers and their employees, which disputes in some cases may, and in other cases will, develop into disputes affecting, not merely the immediate parties thereto, but the national welfare, peace, order and safety and the national trade and business."

Mr. Justice Hodgins was of the opinion that, in so far as the Industrial Disputes Investigation Act affected the Toronto Electric Commission, a body operating locally and formed by provincial authority, such legislation was not competent to the Dominion Parliament. He excluded from his consideration disputes connected with railways, steamships, telegraph and telephone lines, which are expressly covered by the Act, and stated that the court was "not called on to determine whether the Dominion jurisdiction as to railways, other than those under provincial control, or as to shipping and navigation, will preserve this Act in its relation to railway employees or those engaged in such shipping as may be considered a public utility."

The counsel for the Toronto Electric Commissioners appealed the decision of the First Appellate Division of the Supreme Court of Ontario to the Judicial Committee of the Privy Council in England and special leave to appeal was granted by an order of July 25, 1924. The case was heard in the month of November, 1924, by the Judicial Committee, which was composed of Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Wrenbury and Lord Salvesen. The judgment of the Lords of the Judicial Committee, delivered by Viscount Haldane on January 20, 1925, reversed the decision of the majority of the Ontario Appellate Division and declared the Industrial Disputes Investigation Act not to be within the competence of the Dominion Parliament under the terms of section 91 of the British North America Act.

Lord Haldane stated that their Lordships considered the subject-matter of the Industrial Disputes Investigation Act to be one affecting property and civil rights and therefore reserved exclusively to the provincial legislatures. They concurred in the view taken by Mr. Justice Hodgins, but the reservation made in the latter's opinion regarding the interprovincial nature of railways, shipping, telephone and telegraph lines, is not dealt with in the judgment of the Privy Council and the statute is declared *ultra vires* of the Dominion Parliament.

Reference is made in the judgment to provincial legislation regarding industrial disputes and particularly to the Ontario Trade Disputes Act (R.S.O. 1914, c. 145), which is held to be similar in character though restricted to the provincial field. It may be pointed out that their Lordships refer to this statute as if enacted first in 1914, and, therefore, at a later date than the Industrial Disputes Investigation Act, 1907. The Ontario Act was passed in 1894 and is similar to laws passed in British Columbia and Quebec in 1894 and 1901 respectively. In 1890 and 1903 Nova Scotia enacted statutes for the settlement of industrial disputes. Information regarding these laws may be found in Appendix D of this publication—Government Intervention in Labour Disputes in Canada.

The texts of the various judgments mentioned above and the argument before the Judicial Committee of the Privy Council appear in the present volume.

#### CONSTITUTIONALITY OF ACT UPHELD BY COURTS OF THE PROVINCE OF QUEBEC IN 1912 AND 1913

Legal proceedings to determine the constitutionality of the Industrial Disputes Investigation Act were instituted in 1911 by the Montreal Street Railway Company, the case being heard by Mr. Justice Lafontaine, of the Superior Court of Quebec, and, upon appeal, by the Court of Review of the Montreal District, the judgment in each case upholding the validity of the statute on the ground that industrial disputes have a general or national importance and are connected with the peace, order and good government of Canada and are, therefore, under federal jurisdiction.

The texts of the judgments of the Quebec provincial courts will be found in chapter X.

#### APPENDICES

For purposes of reference certain documents have been included as appendices, (A) the text of the Industrial Disputes Investigation Act and amendments, as consolidated by the Parliamentary Counsel, House of Commons; (B) summary tables of proceedings under the statute from 1907 to 1924; (C) the text of sections 91 and 92 of the British North America Act, 1867, defining the legislative authority of the Parliament of Canada and of the provincial legislatures, and (D) an article "Government Intervention in Labour Disputes in Canada," prepared in February, 1924, by the Librarian of the Department of Labour and published in Queen's Quarterly, January-March, 1924.



# I.—JUDGMENT OF MR. JUSTICE ORDE, OF THE HIGH COURT DIVISION OF THE SUPREME COURT OF ONTARIO

*Delivered August 29, 1923*

TORONTO ELECTRIC COMMISSIONERS *v.* SNIDER, *et al*

(Motion for an interim injunction before Mr. Justice Orde in Court, Toronto, 22nd, 23rd, and 27th August, 1923.)

By virtue of sections 16 and 17 of 1, Geo. V, chapter 119, and sections 34 (2) and 36 (1) of the Public Utilities Act, R.S.O., 1914, chapter 204, the plaintiffs are a body corporate charged with the duty of managing and operating the municipal electric light, heat and power works of the city of Toronto. That duty calls for the employment of a large number of men.

In June last representatives of certain of the plaintiffs' employees applied to the Federal Minister of Labour under the provisions of the Dominion Industrial Disputes Investigation Act, 1907, 6-7 Edward VII, chapter 20, for the appointment of a Board of Conciliation and Investigation. After some correspondence between the interested parties and the minister, the minister established a board, and, the plaintiffs declining to recommend any person for appointment as their nominee upon the board, the minister appointed one for them under paragraph 2 of section 8 of the Act. The present defendants constitute the board so appointed.

The plaintiffs at once took exception to the authority of the board and to the power of the Minister of Labour under the Act to appoint a Board of Conciliation and Investigation to inquire into matters concerning the operation by the plaintiffs of a public utility belonging to, or managed as a department of a municipality, or to interfere with the civil or municipal rights of the plaintiffs. The board refused to give effect to the plaintiffs' protest and issued an appointment to proceed with the inquiry. The plaintiff thereupon launched this action, and moved upon notice for an interim injunction, and after notice had been given by my direction to the Attorney General of Ontario and the Attorney General of Canada, pursuant to section 33 of the Ontario Judicature Act, the motion was very fully argued on the 27th instant.

The writ by its endorsement claimed a declaration that the defendants are acting without lawful authority as a board under the Industrial Disputes Investigation Act and its amendments in respect of an alleged dispute between the plaintiffs and certain of their employees, and an injunction.

The points in issue are such that, notwithstanding their importance, it is impossible to postpone a decision upon them until the trial of the action. Mr. Duncan declined to consent to the motion being turned into a motion for judgment, but the intention of the board to proceed immediately with the inquiry necessitated a decision upon what is substantially the whole question involved, though given upon an interlocutory motion.

The question to be determined is whether or not the Industrial Disputes Investigation Act, 1907, with its amendments, was within the powers of the Parliament of Canada, having regard to the provisions of sections 91 and 92 of the British North America Act which divide the power to legislate between the Parliament of Canada and the legislatures of the respective provinces.

Counsel for the defendants does not contend that the subject-matter of the Act falls within any of the twenty-nine enumerated classes expressly assigned to the Dominion Parliament by section 91, but he says that it does not come within any of the sixteen classes exclusively assigned to the provinces by section 92 and that therefore it falls to the jurisdiction of the Dominion Parliament, under the residuary power given by the opening words of section 91, as a law made for the peace, order and good government of Canada, and he contends

that, when so legislating, the Parliament of Canada may, as ancillary to the main subject-matters of the Act, enact laws which interfere with or override civil and municipal rights within the provinces.

The features of the Act to which objection is taken by the plaintiffs are to be found in those sections which interfere with civil rights and not in the innocuous sections which provide some means for settling industrial disputes. It is those provisions for conciliation and those alone that counsel for the defendant relies upon as falling within the residuary powers under section 91 and as justifying the ancillary coercive sections.

It may not be amiss to observe parenthetically that it is open to argument that legislation for the appointment of a board whose sole duty is to endeavour to adjust a dispute, but who are clothed with no coercive powers, and whose judgment or award has no binding effect, is not a "law" at all in the sense in which that word is used in sections 91 and 92 of the British North America Act. The same end might be attained by a mere resolution of the House of Commons or the Senate. Such a resolution could not affect civil rights, and I can see little practical difference between an Act of Parliament or of a provincial legislature merely appointing a body for that purpose, and a resolution passed by any deliberative body of men. A municipal council might do it, or any religious or fraternal body might do it, with as much force of law as the Act in question when stripped of all those provisions which interfere with civil rights or municipal powers. But it is not upon any such construction that my judgment is based. It may be that any act which the Canadian Parliament or a provincial legislature sees fit to pass is a "law" within the meaning of sections 91 and 92 of the British North America Act.

The Act in question is entitled "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities."

The definition of "employers" by paragraph (c) of section 2 in effect limits the operation of the Act to those employing ten or more persons and who own or operate "any mining property, agency of transportation or communication, or public service utility, including, except as hereinafter prescribed, railways whether operated by steam, electricity or other motive power, steamships, telegraph and telephone lines, gas, electric light, water and power works."

The range of inquiry and investigation is to be found in the definition of "dispute" and "industrial dispute" in paragraph (e) of section 2:—

"(e) 'Dispute' or 'industrial dispute' means any dispute or difference between an employer and one or more of his employees as to matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such violation thereof as constitutes an indictable offence); and, without limiting the general nature of the above definition, includes all matters relating to—(1) the wages allowance or other remuneration of employees, or the price paid or to be paid in respect of employment; (2) the hours of employment, sex, age, qualification or status of employees, and the mode, terms and conditions of employment; (3) the employment of children or any person or persons or class of persons, or the dismissal of or refusal to employ any particular person or persons or class of persons; (4) claims on the part of an employer or any employee as to whether and, if so, under what circumstances, preference of employment should or should not be given to one class over another of persons being or not being members of labour or other organizations, British subjects or aliens; (5) materials supplied and alleged to be bad, unfit or unsuitable, or damage alleged to have been done to work; (6) any established custom or usage, either generally or in the particular district affected; (7) the interpretation of an agreement or a clause thereof."

It is not easy to review all the provisions of the Act in detail. Its scheme is very simple. By section 5, whenever any dispute (as defined by section 2) exists between an employer (as so defined) and any of his employees which the parties cannot adjust, application may be made by either party to the minister for a Board of Conciliation and Investigation. Then follow provisions for the



appointment of the board and for the procedure before it. The board's duties are to inquire into the matters in dispute and to "endeavour to bring about a settlement" and failing a settlement to report (sections 23 and 25). The board is not, however, a body of arbitrators, and its report and the findings and recommendations therein have no binding effect whatever, and cannot be enforced, unless the parties have expressly agreed to that effect (sections 62 and 64).

But it is certain coercive features of the Act to which exception is especially taken by the plaintiffs. The board is empowered to summon witnesses, including the parties to the dispute, to compel the production of books, papers and other documents, and to enter buildings and other premises for purposes of inspection, and to interrogate persons therein, and these powers are sanctioned by penalties for failure to attend or to give evidence or to permit inspection (sections 30, 32, 33, 36, 37 and 38).

Sections 56 to 59 contain extremely drastic provisions designed to preserve the *status quo* from the moment the minister grants the application for a board until it has made its report. Notwithstanding that the several contracts of employment may have come to an end, or be subject to cancellation for cause, neither the employers on the one hand nor the employees on the other can exercise their ordinary civil rights of bringing the engagement to an end, or of refusing to renew upon the same terms, if either party sees fit to apply for a Board of Conciliation, without subjecting themselves to serious penalties. Having in view the definition of "dispute" in section 2 (e), which includes, for example, "the interpretation of an agreement or a clause thereof," questions as to materials used, hours of employment, sex and age of employees and other matters going far beyond the mere question of wages, the far-reaching effect of the prohibitions contained in sections 56 to 59 will be appreciated. Once the reference to the board is made neither the employer nor the employee can put an end to the existing situation. The employee must still be retained in his employment and the employer must still pay the same wages, and the employee may not discontinue his employment, the result being that the civil rights of both parties to the dispute are seriously interfered with. Their hands are tied. They continue to be bound by a bargain which they never made until the board has made its report. It can hardly be suggested for a moment that these provisions are not a direct interference with the civil rights of the parties. That is particularly the case if the dispute is over "the interpretation of an agreement." An employer or employee who seeks the interpretation of an existing agreement may find that, instead of being able to go to the courts for a decision, he must await the report of the board, though that report cannot affect his legal rights in any way whatever. But in the meantime neither party can put an end to the contract on the ground of its alleged breach, or exercise any other civil right given him by the law of the province if it comes within the dispute submitted to the board.

Mr. Duncan justified all these provisions which interfere with the civil rights of the parties as being merely ancillary to the main purpose and object of the Act, namely, the settlement of industrial disputes and the prevention of strikes and lockouts, which, as he argues, comes within the authority reserved to the Parliament of Canada by section 91: "To make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." Assuming that the main purpose or object of the Act falls within the residuary power of Parliament under section 91, the judgment of the Judicial Committee in *City of Montreal v. Montreal Street Railway Co.*, (1912) A. C. 333, has made it clear that the provision at the end of section 91, which limits the provincial powers even in matters exclusively assigned to the provinces,

applies only to the 29 enumerated classes of subjects assigned by section 91 to the Parliament of Canada and "that to those matters which are not specified amongst the enumerated subjects of legislation in section 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislatures by section 92" (p. 343). Mr. Justice Duff, who was one of the three judges whose judgment was ultimately confirmed by the Privy Council in the Board of Commerce case (1920), 60 S.C.R., 456, at p. 508, makes this statement: "There is no case of which I am aware in which a Dominion statute, not referable to one of the classes of legislation included in the enumerated heads of section 91 and being of such a character that, from a provincial point of view, it should be considered legislation dealing with 'property and civil rights,' has been held competent to the Dominion under the introductory clause."

The Act in question here, in my judgment, purports to interfere in the most direct and positive manner with the civil rights of employers and employees, and also with the municipal institutions of this province, both subject-matters of legislation exclusively assigned to the provinces by numbers 8 and 13 of the subjects enumerated in section 92. That the operation of an electric lighting, heating and power system for municipal purposes is within the competence of a provincial legislature was held by a Divisional Court in *Smith v. City of London* (1909), 20, O.L.R., 133, and the system is none the less a municipal one merely because it is operated by a commission having a separate corporate existence, but nevertheless a distinct department of the municipal government of the city of Toronto constituted by special legislation, for that purpose, of the provincial legislature. Municipal institutions and the provincial power to legislate in respect thereof are of course subject to encroachment by the exercise of the federal powers over the 29 subjects enumerated in section 91, but under the decision in the Montreal case, *supra*, no such encroachment can be justified when the Dominion Parliament is legislating under the residuary power.

If it is suggested that, by the provisions which impose penalties, and which subject both employer and employee to criminal prosecution for failure to observe the prohibitions imposed by the Act, it may be justified under the federal power to pass criminal laws, then I think the judgment of the Privy Council in the Board of Commerce case, where a similar contention was made, is applicable. Lord Haldane points out there that the Dominion Parliament cannot pass legislation interfering with provincial rights and attempt to justify it by ancillary provisions creating crimes: *In re the Board of Commerce Act, 1919*, and the Combines and Fair Prices Act, 1919, (1922) 1 A.C. 191, at pp. 198 and 199.

The recent judgment of the Judicial Committee delivered on the 25th July last in the case of *Fort Frances Pulp and Paper Company v. Manitoba Free Press Co.* might lend colour to the suggestion that there may be cases, notwithstanding what was laid down in the Montreal Street Railway case, where in a "national emergency" the Parliament of Canada may have power to pass legislation under the residuary clause infringing upon provincial rights. If that is what is meant, the decision in the Montreal Street Railway case must be read with some qualification. Mr. Duncan urged that the prevention of strikes and lockouts was a matter of such national importance as to bring the Industrial Disputes Investigation Act within the principle enunciated by Lord Haldane in the Fort Frances case (assuming that it has enunciated a principle which departs from that laid down in the Montreal Street Railway case), but, whatever the power of Parliament may be to legislate expressly in the event of an existing or threatened nation-wide strike of such proportions as to constitute a national danger, I am unable to see how an Act of general application which may be invoked by 10 employees can be treated as having been passed to meet a



"national emergency" in the sense in which the Fort Frances judgment uses that term. That judgment will require careful thought before giving it any application at variance with earlier decisions of the Judicial Committee, and it may be that the Judicial Committee justified the War Measures Act, 1914, as competent to the Dominion "under other powers which may well be implied in the constitution." As the judgment says: "It is clear that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers" which was there in question. Here there is nothing abnormal or necessarily of national importance in an industrial dispute or in a threatened strike or lockout, and the desire of the Dominion Parliament to prevent strikes and lockouts, however laudable it may be, and however effective the machinery devised for the purpose might be if Parliament were not hampered by a divided field of legislative power, cannot empower Parliament to invade either directly, or indirectly, under the guise of ancillary legislation, right, either given by the civil laws of the province or existing under the exclusive provincial authority, to legislate as to municipal institutions. I have not overlooked the decision in the *Province of Quebec, Montreal Street Railway Co. v. Board of Conciliation and Investigation* (1913), Q.R. 44, S.C. 350. The authority of that decision has been so affected by later decisions of the Privy Council that I do not see that it is binding upon me or that it is now a correct exposition of the law.

Counsel for the defendants raised the objection that there could be no ground for an interim injunction until the board took or threatened to take steps to put the coercive provisions of the Act into operation. But when asked if he would undertake on their behalf not to do so, he declined. I do not think that the plaintiffs are called upon to wait until the defendants are about to enter their works and have demanded the production of their books and documents before coming to the court. The granting of an interim injunction is, of course, a matter of discretion, but it calls for the exercise of a little common sense. I think the plaintiffs are entitled to assume that the board may see fit to exercise or put into force all or any of the coercive powers given to it by the Act, and are not bound to wait until the defendants are demanding admission at their front door.

Mr. Duncan also raised certain objections to the form of the action, urging that it was not a case of a declaratory judgment as claimed by the writ, and that no action lay against the defendants. It will be for the trial judge to deal with the former objections, but I desire to point out that, if an action for an injunction lies against these defendants, it is of little practicable importance whether the plaintiffs ask for a declaratory judgment as to the validity of the Act or not, if, in order to determine the right to an injunction or otherwise, the court must pass upon the constitutionality of the Act, or of some of its provisions. As to the defendants being proper parties, if they are claiming to exercise to the detriment of the plaintiffs, powers for which there is no legal sanction, the plaintiffs are clearly entitled to enforce their rights by injunction.

I ought to add that I have come to this conclusion with reluctance. I am of course merely dealing with the bald question of law which presents itself for consideration under the provisions of the British North America Act. It seems to be generally recognized that the Industrial Disputes Investigation Act has been a beneficial one and has facilitated the settlement of numerous disputes, and it is to be hoped that, whatever the ultimate decision as to its constitutionality may be, it will be found possible to pass legislation, either federal or provincial or both, which will maintain the efficiency of the scheme of the Act.

The plaintiffs press for an injunction restraining the defendants from performing any of the functions which they are called by the Act to perform on the ground that the whole Act is unconstitutional. I am not prepared upon a mere interlocutory motion to go that far; whether or not an innocent enquiry as to an industrial dispute, not fortified by any coercive power, is beyond the competence

of the Canadian Parliament, I do not think it necessary at this stage to determine.

The injunction ought to go restraining the defendants from interfering in any way with the business of the plaintiffs and from entering upon the premises of the plaintiffs for the purpose of examining their works or enforcing any of those powers given them by section 38. They have no power to enforce the attendance of witnesses, or the production of books, papers or other documents either by the plaintiffs or by anyone else who chooses to withhold them. Of course individual witnesses not parties to these proceedings get no technical protection from this judgment. What remains is that the powers of the Board of Conciliation are in my opinion limited to an investigation merely of a voluntary character. I think they have no power to enforce, by the means the Act has provided, any of the provisions which interfere with the liberty or freedom of the parties to contract, or the right to strike or lockout, or to carry on their respective businesses as they may see fit. I do not think sections 56, 57, 58 and 59 are effective. Those sections have really nothing to do with the immediate subject-matters of this interim injunction because the Conciliation Board does not necessarily enforce them; they are perhaps enforceable by anyone who chooses to lay any information. The board is, in my judgment, limited to the innocuous duty of investigating and making a report, but cannot put into force those drastic provisions of the Act which interfere with the civil and municipal rights or the rights of property of any party to the dispute. The injunction will continue until the trial, the question of costs being reserved to be disposed of by the trial judge.



## II.—JUDGMENT OF MR. JUSTICE MOWAT (Trial Judge) OF THE HIGH COURT DIVISION OF THE SUPREME COURT OF ONTARIO

*Delivered December 15, 1923*

TORONTO ELECTRIC COMMISSIONERS *v.* SNIDER *et al*

This action is for a declaration that the defendants have no right to act as a Board of Conciliation and Investigation in respect of an alleged dispute between the plaintiffs and their employees, and is brought in the main to dispute the constitutional right of the Parliament of Canada to pass the Industrial Disputes Investigation Act (1907) generally, and in particular as it affects the relations between the Toronto Electric Commissioners, who are entrusted by statutes of the province of Ontario with the powers and duties of producing and controlling electrical power, and their employees.

The Act in question is challenged upon the ground that it interferes with the remitted powers of the province under section 92 of the British North America Act, as follows: subsection 8, municipal institutions in the province; subsection 13, property and civil rights in the province; subsection 16, generally all matters of a merely local or private nature in the province.

The scheme of the Industrial Disputes Investigation Act is to compel the parties to a threatened strike or lockout to meet together in conference in which both employer and employees may state their cases and differences, with a view that they may be, by conciliatory efforts, induced to come to a fair and amicable settlement of the dispute, so as to remove tense and disrupted relations, failing which the board is to make a report giving its information to the public. And it is empowered for this purpose to interfere with contracts in existence between the hirer and the hired, freedom of action while the discussions and proceedings are taking place, and incidentally to enter upon and inspect works and examine books and reports, so that all facts and circumstances may be disclosed.

It may be conceded that the obligatory character of the Act in these respects is an invasion of the field of "property and civil rights," but it is urged on behalf of the Attorney-General for Canada and the defendants, the members of the Board of Conciliation appointed under the Act, that such requirements are necessary and that the effective or possible determination of industrial strife gives the Dominion Parliament power so to trench upon the subjects mentioned in subsections 8, 13 and 16 of section 92, in order that a law necessary for "the peace, order and good government of Canada" may be effectively administered and enforced.

Having come to the conclusion that the constitutional question raised is the all-important one, I do not here deal with the evidence directed to that feature of the case which deals with the procedure leading up to the appointment of the Board of Conciliation which was made and the propriety of its appointment. In a general way I find that the requirements of the statute have been complied with.

I therefore pass on to discuss the constitutional point raised.

The question of industrial strife, together with its ramifications and the growth of labour unions, is vastly different from the condition existing at the time of the passing of the British North America Act in 1867, and the silence of the Act regarding "labour" and the absence of the specific allocation of that subject to the Dominion or the provinces is thus accounted for. But it may be observed that the question of labour has, for more than twenty years, been appropriated by the Dominion Parliament and Government. There is a Department of Labour, with a Minister of Labour in charge; periodical publications dealing with labour questions, the labour market, the current cost of living, and the employment of the military forces of Canada in the protection of property and the public safety where violent eruptions have occurred or may

This department has, by common consent of the provinces during this long period, been the principal administrative means of dealing with the question of eruptive industrial strife; and, while the fact of acquiescence does not settle a constitutional point of law, and if there is no authority for the taking over of labour problems by the Dominion, yet a declaration of the court that all such administrative actions are to cease, and inferentially that all the governments and their law officers have erred, or slept, should not be arrived at unless the law is clear.

Canada's constitutional problems have all found their way to the Judicial Committee of the Privy Council, whose members have taken enormous pains, from period to period, in their elucidation, and it is by the views of that tribunal that we are to be guided.

The allocation by the British North America Act of subjects to Dominion or provinces by general heads or titles, means overlapping and impingement and in *Citizens and Queen Insurance Companies v. Parsons* (1881) 7 A.C. 96, Sir Montague Smith says, (p. 107):—

"The scheme of this legislation, as expressed in the first branch of section 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature."

And at pages 108, 109:—

"It is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in each case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted and, where necessary, modified by that of the other. In this way it may in most cases be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and give effect to all of them."

And per Lord Dunedin in *Grand Trunk Railway Company v. Attorney-General of Canada* (1907) A.C. 65 ("Contracting Out" case), at page 68:—

"First . . . there can be a domain in which provincial and dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the dominion legislation must prevail."

In *John Deere Plow Company Limited v. Wharton* (1915), A.C. 330, Viscount Haldane said, (pages 338, 339):—

"The language of these sections (91 and 92) and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunction of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them, the remark applies. . . . If there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principles, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decisions. . . . In discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this ruling appears. . . . to be of special importance. When putting a construction on the scope of the words 'civil rights' in particular cases, an abstract logical definition of their scope is not only, having regard to the context of sections 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possibly injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative domain of the Dominion or Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality."



It appears to me that "labour" legislation such as the Industrial Disputes Investigation Act is one of national concern. It is important that a close touch should be kept of the movements and variations of industrial strife and that this can best be done, as such strife existed in 1907 and until the present time, by the Federal Government. A general strike in Winnipeg in 1919 was only brought to an end through the voluntary efforts of the non-industrial citizens to break it, and to prevent the misery and underfeeding of children which seemed likely to ensue. All important labour unions in Canada were sympathetically affected by it from ocean to ocean, and if it had spread, as at one time feared, ruinous conditions would have ensued to trade and stable industry. In such a case provincial lines are obliterated and the provinces, not having the means of free and instant communication with each other, or for concert, could ill avert dominion-wide trouble. The simple local strikes which alone could have been in contemplation of the Fathers in 1864 and 1867, have given place to those of brotherhoods composed in some instances of hundreds of thousands, and dominion-wide in their operations and probably beyond the resources of each province to deal with. As was said by Lord Watson, in stating the opinion of the Judicial Committee in *Attorney General for Ontario v. Attorney General for the Dominion* (1896), A.C. 348, 361:—

"Some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interests of the Dominion, but great caution must be observed in distinguishing between that which is local and provincial . . . and that which has ceased to be merely local or provincial and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."

In *Russell v. The Queen* (1882) 7, A.C. 829 it was held that the restriction of intemperance was a matter of public order and safety although it infringed on property and civil rights. And this case, although the Attorneys-General were not represented, has been expressly reaffirmed in statements by the committee.

If such an ill as occasional overdrinking is subject to Dominion legislation, it must follow that the prevention of strikes by conciliation which conceivably might occasion the starving of the people should also be.

In the last case on the subject, it was held that regulation of the price of newsprint paper, upon which soothing and uninterrupted information might be written to quiet the nerves of the people racked by the Great War, but which was over when the regulation was passed, was within the powers of the Dominion, the Viscount Haldane saying: "No authority other than the central government is in a position to deal with a problem which is essentially one of state-manship." *Fort Frances Pulp and Paper Co. v. Manitoba Press Co.* (1923), A.C. 695, 706.

The elements of "municipal affairs" and "matters of a merely local and private nature" come within the same reasoning.

I note that Mr. Justice Orde in this very case, reported 25 O.W.N. 64, heard a motion for an interim injunction upon material which substantially raised the same issue as that raised by the evidence at the trial before me and gave a considered judgment, reasoned with his usual clearness, coming to a conclusion differing from that to be gathered from what I have here said.

The Ontario Judicature Act, section 32, declares that a judge cannot disregard or depart from a prior known decision of any other judge of co-ordinate authority on any point of law without his concurrence, and, as I have not that concurrence, although I have no reason to think it would not be given, I must say with reluctance, but to be formally correct, that I deem his decision to be wrong and the case of sufficient importance to warrant me in referring it, with the record and evidence before me, to one of the appellate divisions, together with the costs of action; and such reference is therefore made.

### III.—JUDGMENT OF THE FIRST APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

(Mulock, C. J. O., Magee, Hodgins, Ferguson, and Smith, J. J. A.)

TORONTO ELECTRIC COMMISSIONERS *v.* SNIDER *et al*

*Delivered by Ferguson, J. A., April 22, 1924*

Continuation of the trial on a reference to this court by Mowat, J., under section 32 of the Judicature Act, R.S.O., cap 56, ss. 3 and 4, which read:—

"(3) If a judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to a Divisional Court.

"(4) Where a case is so referred, it shall be set down for hearing, and notice of hearing shall be given in like manner as in the case of an appeal to a Divisional Court."

The plaintiffs are a Board of Commissioners appointed under sections 16 and 17 of I George V, chapter 119 (Ontario) (An Act respecting the City of Toronto), to manage the municipal electric light, etc., of the city of Toronto. They are a body corporate and have the duties and powers of commissioners under the Public Utilities Act, R.S.O. (1914), chapter 104. The defendants are a Board of Conciliation and Investigation appointed under and pursuant to the Industrial Disputes Investigation Act (1907) with all the powers conferred by that Act upon commissioners appointed thereunder for the purpose of investigating, reporting upon and bringing about a settlement between the plaintiffs and their employees. The Attorney General of Canada and the Attorney General of Ontario are not parties but appear pursuant to notice served upon them under section 33 of the Judicature Act, which provides that, where, in any action or proceeding, the constitutional validity of any Act of the Parliament of Canada or the Legislature of Ontario is brought into question, the same shall not be adjudged invalid until after notice has been served upon the Attorney General for Canada and the Attorney General for Ontario; also that the Attorney General for Canada and the Attorney General for Ontario shall be entitled as of right to be heard either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding.

The plaintiffs plead that the Industrial Disputes Investigation Act is not within the powers conferred on the Parliament of Canada by the British North America Act, because (1) it deals with property and civil rights in the province, subjects (class 13) exclusively assigned to the provincial legislatures by section 92 of the British North America Act; (2) it interferes with municipal institutions, one of the classes of subjects (class 8) exclusively assigned to the provincial legislatures by section 92 of the British North America Act; (3) it is an interference with a local work or undertaking, subjects (class 10) exclusively assigned to provincial legislatures by section 92 of the British North America Act.

The plaintiffs ask the following relief: (1) a declaration that the defendants are, without lawful authority, acting as a Board of Conciliation and Investigation into alleged disputes between the plaintiffs and certain of their employees; (2) an injunction restraining the defendants and each of them from proceeding with the investigation, or, in the alternative, for a perpetual injunction in the terms of an interim injunction granted herein by the Hon. Mr. Justice Orde.

Before pleading, the plaintiffs applied for and obtained from Mr. Justice Orde, sitting in Weekly Court, an interim injunction restraining the defendants, until the trial, from interfering with the business of the plaintiffs, from entering upon the premises of the plaintiffs, from examining the plaintiffs' work or



employees upon the plaintiffs' premises, and from exercising any of the compulsory powers contained in sections 30 to 38 of the Industrial Disputes Investigation Act, and from interfering in any way with the property and civil rights or the municipal rights of the plaintiffs.

The interim injunction was not granted merely because the learned judge who made the order was of opinion that sufficient had been shown to entitle the plaintiffs to have the rights of the parties determined by a trial before the proposed investigation was proceeded with. His reasons for making the order make it clear that, after a careful review and consideration of the authorities, he was of opinion that the Industrial Disputes Investigation Act is *ultra vires* of the Parliament of Canada. The trial judge, being of a different opinion, considered the interim injunction order granted by Mr. Justice Orde and his reasons therefor a decision previously given within the meaning of section 32 of the Judicature Act entitling and requiring him to refer the question raised to the Appellate Division for their decision.

It is not, I think, necessary for the decision of the case at bar to pass upon the constitutional validity of any sections or provision in this Act which do not deal with the powers of the board, and consequently it is not necessary to consider the constitutional validity of sections 56 to 61, which deal with strikes and lockouts prior to and pending a reference to a board of inquiry.

I am of opinion that, while sections 30, 36 and 37 of the Act confer on the board compulsory powers which trench upon property and civil rights, and authorize the board to inquire into industries that are in some cases local works carried on by municipalities, yet my opinion is that, according to the "true nature and effect of the enactment," "its pith and substance," the legislation is not law in relation to "municipal institutions" (8), local works (10), property and civil rights (13), matters purely local (16), as these words are used in subsections 8, 10, 13 and 16 of section 92 of the British North America Act, but is legislation to authorize and provide machinery for conducting an inquiry and investigation into industrial disputes between certain classes of employers and their employees, which disputes in some cases may, and in other cases will, develop into disputes affecting not merely the immediate parties thereto, but the national welfare, peace, order and safety, and the national trade and business.

The purpose of the inquiry authorized by the Act is, I think, three-fold: (1) the regulation of trade and business by preventing the interruption of trade and commerce necessarily incident to delaying, hindering, interrupting or stopping the operation of mines or public utilities; (2) the promotion and protection of national public peace, order and safety by (a) confining the dispute to a limited district, or bringing about a settlement, (b) by informing the public in reference to the cause and nature of the dispute, (3) by bringing to bear upon the parties intelligent public opinion, and through that agency preventing the breaking out and spreading of strikes or lockouts and the disturbances, rioting and breaches of the peace and criminal law which, it is common knowledge, frequently follow the stopping, by strike or lockout, of the operation of mines, agencies of transportation or communication and public service utilities which furnish such necessities as light, heat and power.

Counsel for the defendants and the Attorney General for the Dominion submitted that, as, according to its "true nature and effect," its "pith and substance," and its title, the Act here in question is legislation in reference to industrial disputes, and as the Imperial Parliament, in the Australian Constitution Act (63-64), Victoria, recognized and treated industrial disputes as presenting an aspect of peace, order and good government that required special legislative treatment (see section 51 of the Australian Act), we may and should hold that the legislation does not fall within any of the classes enumerated in section 92 of the British North America Act. Basing his argument on the foregoing

submission, and on a statement of the Judicial Committee in *Russell v. The Queen* 7 A.C., at p. 836, and another statement in the *Alberta Insurance* case (1916), 1 A.C. 588 at 595, counsel for the Dominion urges that the legislation here in question is valid because it is a class of legislation not covered by or included in any of the classes enumerated in section 92 of the *British North America Act*.

The statements of the Judicial Committee relied upon for this proposition, read (*Russell v. The Queen*, p. 836):—

"The first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces. If it does, then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in section 92, no further question will remain, for it cannot be contended, and indeed was not contended at their Lordships' bar, that, if the Act does not come within one of the classes of subjects assigned to the provincial legislatures, the Parliament of Canada had not, by its general power 'to make laws for the peace, order and good government of Canada,' full legislative authority to pass it."

(The *Alberta* case, p. 595):—

"It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of section 91 of the *British North America Act* confers, does not, unless the subject-matter of legislation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in section 92. There is only one case, outside the heads enumerated in section 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under section 92. *Russell vs. The Queen* is an instance of such a case."

Counsel for the plaintiffs and the Attorney General for Ontario submit that the legislation here in question trenches upon the classes of legislation enumerated in subsections 8, 10, 13 and 16 of section 92, and that the Dominion Parliament may not trench on any class enumerated in section 92, except to legislate in respect of a class enumerated in section 91, and for the later submission they rely upon the statements quoted by Mr. Justice Orde, from *Montreal v. Montreal* (1912), A.C. 333; the opinion of Mr. Justice Duff in the *Board of Commerce* case, 60 S.C.R. 456 at 508; the statements in *Attorney General for Ontario v. Attorney General for the Dominion* (1896) A.C. 348 at 360; the first sentence I have quoted from the *Alberta* case (*supra*). The plaintiffs and the Attorney General for Ontario further submit that *Russell v. The Queen* is not now regarded as authority for the statement that Dominion legislation which trenches upon any of the classes enumerated in section 92 can be supported on the peace, order and good government clause of section 91 without aid from one or more of the classes enumerated in section 91, and in support of this proposition they refer to a statement appearing at pages XIX and XX, *Cameron's Canadian Companies* in the Judicial Committee.

Though in the view I have taken it is not necessary to rest my judgment upon the meaning and effect of the authorities cited for and against the proposition stated by counsel for the defendants and the Attorney General for the Dominion, I think it proper to say that I am not convinced that the point raised has been yet decided. As I read *Russell v. The Queen*, there is much in the reasons for the result in that case to support the view that the right of the Dominion to enact the legislation there in question could be and was supported by reference to and on the power of the Dominion to legislate in reference to public wrongs and criminal law and trade and commerce, rather than on power to legislate in reference to an unenumerated subject. I am also of the opinion that the decision on this point was not necessary to the determination of the *Alberta Insurance* case (*supra*), and as I read the *Montreal* case, it decided



only that the power to regulate rates and traffic on connecting provincial lines was not *necessarily incident* to the regulation of rates and traffic on Dominion railways. In the Board of Commerce case, Mr. Justice Duff's statement does not take the form of a pronouncement on a point necessary to the decision of the case he was considering.

In the Distillers and Brewers case (1896) A.C. at 360, the Committee states the proposition as it is stated by Mr. Justice Duff in the Board of Commerce case, and yet in the same case accepts and treats *Russell v. The Queen* as rightly decided.

After a careful perusal of the authorities, I am unable to reconcile the cases or the two propositions in the statement I have quoted from the *Alberta Insurance* case, unless it be that the legislation in *Russell v. The Queen* did not, in the opinion of the Judicial Committee, even trench upon any of the powers conferred upon the provinces by section 92, or unless it be that the opinions of the Judicial Committee in *Russell v. The Queen*, and in the *Fort Frances* case (1923), A.C. 695, are founded upon the proposition that, where a condition arises in which the peace, order and welfare of the Dominion as a whole is affected and that condition cannot be effectively met, controlled and regulated by provincial legislation, the Dominion Parliament has power to legislate under the peace, order and good government clause of section 91 even if in so doing it trenches upon some of the classes enumerated in section 92. While there are statements in the reasons for judgments in the *Russell* case and the *Fort Frances* case which appear to support the last proposition, it is not, I think, clear that the proposition was necessary to the decision of either case or that it is laid down in either case.

In the absence of clear and binding authority requiring me to do so, I am not prepared to hold that such a wide and far reaching power must, can or should be implied in order to give effect to the agreement which the Imperial Parliament embodied in the British North America Act. I incline to the view that if the *Russell* case is not supported by reference to subsection 27 of section 91, criminal law, and subsection 2, trade and commerce, then it must be taken to have been determined on a finding that the legislation did not in fact trench upon any class enumerated in section 92 and that the *Fort Frances* case is based upon a finding of such an abnormal condition that the necessities of the situation demanded, required and justified the implying of an overriding power to legislate so as to meet, regulate and control an abnormal condition amounting to a great national emergency, in which the safety of the nation as such was threatened.

For these reasons I am of opinion that the weight of authority is in favour of the proposition that, except in conditions involving the very safety of the Dominion as a political entity, the Parliament of Canada may not in its legislation trench upon any of the subjects enumerated in section 92, unless such legislation, according to its pith and substance, is legislation in relation to a class of legislation enumerated in section 91 of the British North America Act.

Counsel for the Attorney General for the Dominion and the defendants submit that, if the legislation cannot be supported as not falling within or trenching upon any of the classes enumerated in section 92, it can and should be supported as legislation in respect of one or more of the classes enumerated in section 91 of the British North America Act.

The wording of section 91 of the British North America Act makes clear that legislation which comes within any of the enumerated classes of section 91 is within the power of the Dominion Parliament, and numerous cases, many of which are quoted in the latest pronouncement of the Judicial Committee in *re Reciprocal Insurance* (1924), 1 D.L.R. 789 at 795, establish that the class of legislation is determined by reference to "its true nature and character," "its pith and substance," "its paramount purpose."

I have already expressed my opinion as to "the true nature and character of the legislation," "its pith and substance," "its paramount purpose," and that brings me to the inquiry: Does legislation of that nature fall within any of the enumerated classes of section 91? In such an inquiry, two classes suggest themselves. They are:—

- (1) The regulation of trade and commerce (section 91, class 2).
- (2) The criminal law, except the constitution of courts of criminal jurisdiction (section 91, class 27).

The meaning of "trade and commerce" as used in the section has been considered in a number of cases. These cases are collected and discussed in Cameron's Canadian Constitution, pages 75 to 78, and while the scope of this power of the Dominion to regulate trade and commerce is not defined or determined by any of the cases considered, it was said in *Citizens v. Parsons*, 7 A.C. 96, that: "the words include the political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be they would include general regulation of trade affecting the whole Dominion."

The scope of class 27 was considered in *Attorney General for Ontario v. Hamilton Street Railway*, 1903, A.C. 524, and in that case the Judicial Committee said that the words "criminal law" meant "criminal law in its widest sense."

While it may be argued that regulations in reference to trade and commerce mean regulations defining how or in what manner articles or commodities shall be dealt or traded in rather than regulations in reference to the production thereof, and that the object of the investigation is to prevent the interruption of production rather than interruption of trading in commodities produced, I am of opinion that the "employers" named in subsection (c) of section 2 of the Industrial Disputes Investigation Act are dealers and vendors in articles of trade and commerce, as well as producers thereof, and that the legislation here in question may be read as being legislation to prevent the shutting down and the stopping of plants and industries which vend and deal in articles of trade and commerce, which, by reason of their very nature, are of national importance. It cannot be disputed that to deprive the city of Toronto of electric power on which it depends for light, heat and power is to disturb and hinder the national trade and commerce and to endanger public peace, order and safety.

As to criminal law, it may be argued that criminal law means only law defining crimes and fixing punishments therefor. It is to be noted that section 91 of the British North America Act does not confine the power of the Dominion to making criminal law, but that the power extends to making law *in relation to* the criminal law. My view is that the power to make law *in relation to* the criminal law in its widest sense, includes power to make laws a paramount purpose of which is the prevention of public wrongs and crime, and the maintenance of public safety, peace and order, and that the power of defining what shall constitute a crime, and providing for punishment, is only a part of the power conferred on the Dominion Parliament by class 27, section 91, of the British North America Act.

Industrial disputes are not now regarded as matters concerning only a disputing employer and his employees. It is common knowledge that such disputes are matters of public interest and concern, and frequently of national and international importance. This is so, not because the disputes may result in many plants being shut down, or tens, hundreds and even thousands of employees drawing strike pay instead of wages, but because experience has taught that such disputes not infrequently develop into quarrels wherein or by reason whereof public wrongs are done and crimes are committed, and the safety of the public and the public peace are endangered and broken, and the national



trade and commerce is disturbed and hindered by strikes and lockouts extending, not only throughout the Dominion, but frequently to the United States, where most of our trade unions have their headquarters. Being of opinion that the Act is not one to control or regulate contractual or civil rights, but one to authorize an inquiry into conditions or disputes, and that the prevention of crimes, the protection of public safety, peace and order and the protection of trade and commerce are of the "pith and substance and paramount purposes" of the Industrial Disputes Investigation Act and of the enquiry authorized and directed thereby, I think the legislation may and should be supported on the powers conferred upon the Dominion Parliament by section 91, British North America Act, to make laws "*in relation to*" "the regulation of trade and commerce," and to make laws "*in relation to*" "the criminal law" "in its widest sense," even though it does not enact a criminal law or a law defining how or in what manner trade and commerce shall be carried on. See *Russell v. The Queen*, 7 A.C. 829, in which the Judicial Committee, referring to the Canada Temperance Act, said (p. 839):—

"Laws of this nature designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada. . . . Few, if any laws, could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights, and it could not have been intended, when assuring to the province exclusive legislative authority on the subject of property and civil rights, to exclude the Parliament from the exercise of its general powers whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subject to which it really belongs."

I would dismiss the action with costs including costs of injunction proceedings, but would stay the issue of the judgment and the order dissolving the injunction restraining the defendant from proceeding with the enquiry for such time as is reasonably necessary to allow an appeal to be taken.

SMITH, J. A.: I agree.

MAGEE, J. A.: I agree.

MULOCK, C. J. O.: I agree with my brother Ferguson that the impugned portion of the legislation in question is legislation within the competency of the Dominion Parliament under its powers to make laws for the peace, order and good government of Canada in relation to the regulation of trade and commerce, and therefore think the action should be dismissed with costs.

#### DISSENTING OPINION OF MR. JUSTICE HODGINS

HODGINS, J. A.: This matter comes before us in the form, first, of an appeal by the defendants, members of a Conciliation Board appointed under the Industrial Disputes Investigation Act, 1907, and amendments, from an order of Mr. Justice Orde, and, second, for judgment in the action which was referred to this court by the trial judge, Mr. Justice Mowat, pursuant to section 32 of the Judicature Act.

It is to be doubted whether the last-mentioned section is applicable, as the order of Mr. Justice Orde merely continued an injunction in this action until the trial. It is true that he expressed an opinion upon the Industrial Disputes Investigation Act, from which the trial judge differed, but this view was given on an interlocutory application and upon certain facts disclosed in affidavits. This was, in my judgment, not binding upon the trial judge at the trial of the action where certain other facts, pro and con, were adduced in evidence, and

therefore was not such a decision as would bring the case within that section. But as the appeal from the order, and the argument on the merits of the action, involved the same question as to the constitutionality of the Act referred to and its amendments, it is not necessary to say more on this point.

It was suggested during the argument that, as the Act was passed in 1907, it must be viewed and judged in relation to the industrial and social conditions which existed at that date, irrespective of what has happened since. Whether or not the existence of these conditions, either the earlier or the later, prove to be of importance upon the question of constitutionality, it is the fact that the Act was amended in 1910, 1918, and 1920. If, therefore, the question of *intra vires* or *ultra vires* depends in any way upon what was happening or had happened in the Dominion, it would seem reasonable that the action of Parliament in those years should be regarded as an affirmation by it of the Act of 1907 as applicable to national conditions existing when the amendments were made. This consideration cannot be left out of sight if, as I have said, such earlier or later events are of importance in considering the legal validity of the Act.

It was urged on behalf of the defendants, and by counsel for the Attorney General of Canada, that Parliament could enact statutes, under the general power given to it to be exercised for the "peace, order and good government" of Canada, provided these statutes were not enacted directly "in relation to" civil rights, but in relation to what was called "industrial strife," a subject not mentioned in 1867 and so not attributed by the British North America Act either to the provinces or to the Dominion. But industrial strife, as explained in the argument, is nothing more than the result of the misuse or undesirable use of the civil right to cease work or to cease the operations of various businesses, singly or in concert, with the consequences resulting therefrom which are generally known as strikes or lockouts. This argument is therefore practically an endeavour to define jurisdiction by attempting to invent a new field, which, when examined, is found to be only a department of, or development in, one of those mentioned as exclusively possessed by the provincial legislature. But the argument took a wider and more plausible range. It was said that the Act, when examined in the light of the evidence adduced, dealt with a subject which transcended or might easily transcend provincial limits and was in fact one of Dominion-wide aspect. The evidence discloses, what is well known, that strikes and lockouts, while arising in defined localities, are, owing to the highly organized methods of modern labour, likely to spread and have indeed in some instances spread among allied and sympathetic trades and businesses. This, it is said, enlarges the field to be covered by legislation so as to make it imperative to the peace, order and good government of the Dominion that Parliament should take command of the situation and provide against a probable spread of industrial strife and consequent dislocation of business which might extend throughout the whole country. No one can deny that these consequences may follow from certain labour disputes, nor if they do occur are the disastrous results forecast to be minimized. Indeed, it is conceivable that there may arise conditions in connection with this subject which might give great force to the contention that the peace, order and good government of the Dominion demanded that Parliament should use the general powers given to it by the British North America Act. It was also urged that these might rise to such a height as to be comparable to other contingencies, such as war, famine or rebellion, which, as indicated in the Board of Commerce case, (1922) 1 A.C. 191, and in the Fort Frances case, (1913) A.C. 695, might justify such action.

It is necessary, therefore, to consider whether this statute can be supported under (1) emergency, (2) as dealing with a matter of general Canadian interest and importance, and (3) whether under any enumerated head of jurisdiction it has been validly enacted. It must be premised that, as railways, steamships,



telegraph and telephone lines are included in the definition of "employer," what follows is limited to the effect of the Act in relation to the respondents, a commission operating locally and formed by provincial authority.

To deal first with the emergency argument. Evidence in this case does not disclose that such an emergency had arisen in 1907 or in the later years mentioned (though a sympathetic strike in another province is shown), nor that it is to be definitely apprehended at present or at any particular time; nor is the legislation framed so as to come into operation only when these abnormal conditions have arisen or these consequences are imminent. This form of legislation is said to be convenient and not unusual and to be open to the appropriate legislature.—See *Russell v. The Queen* (1882), 7 A.C. 829, 835. Reasonable fear that these extraordinary circumstances might arise in this country would seem to indicate that much more drastic and effective legislation than the present would be necessary to cope with them. The present statute is not, when examined, based upon either condition, but upon the normal working of industrial relations, which often require time and patience and some restraint, to afford protection against dislocation or disturbance in the usual conduct of business as between employer and employees. It is essentially a sedative measure, and is not in any way designed to meet serious emergencies. It must be judged upon what it deals with in fact, and upon what is its effect in so dealing. What is referred to as the true nature and character of the legislation has hitherto been sought in the enactment itself and not in the desirability of the end which it is intended to accomplish, considered apart from its actual operation and legal effect. It is what it really does, and the means used, that determine whether the purpose has been achieved in a constitutional manner. If it passes over the line and invades provincial jurisdiction, then to that extent it must be invalid unless it comes within one or more of the enumerated matters attributed to the Parliament of Canada or there is shown to have transpired such a Dominion-wide condition of affairs as would necessarily compel the conclusion that the peace, order and good government of the whole country require its enactment in the interests of the whole Dominion. Such a condition was exemplified in the *Board of Commerce* (1922), 1 A.C. 191, and the *Fort Frances* case (1923), A.C. 695, and is discussed in relation to a threatened railway strike in the United States, in *Wilson v. New*, 243 U.S. 332, and as to the housing difficulty in *Block v. Hirsch*, 256 U.S. 136.

In both the Canadian cases "special circumstances such as those of a great war," "highly exceptional circumstances," "sudden danger to social order," "exceptional cases" (such as war), "special circumstances of national emergency which concern nothing short of the peace, order and good government of Canada as a whole" are the phrases used to illustrate the meaning of an emergency such as justifies calling into operation the ultimate power residing in the peace, order and good government clause. The special and exceptional conditions of national emergency do not seem to exist in fact, and the apprehension that they may and will arise in the future will be better considered under the second head.

This second head needs a more detailed consideration of the Act itself. Its intent is described in the words of the Deputy Minister of Labour in 1902, as "carrying as far as possible the principal of voluntary conciliation, but substituting for a compulsory arbitration, with its coercive penalties, the principal of compulsory investigation, and its recognition of the influence of an informed public opinion upon matters of vital concern to the public itself."

Its legal effect may be said to be the creation of a tribunal with such coercive powers as will enable it to investigate a local industrial dispute and to make a report upon the facts found by such investigation, but without authority to enforce or apply to the parties the recommendation or findings of that report.

It seems to fall naturally into four main divisions. It defines industrial disputes and the parties thereto; it enables either party to the dispute to create a Board of Conciliation either by the co-operation of the other party or through the intervention of the Minister of Labour, or by the minister, without any application, under certain circumstances; it compels the maintenance of the *status quo* as between employers and employees pending the action of the board; and finally it vests in the board certain coercive powers over the parties to the dispute and their affairs and imposes penalties for disobedience to the board's exercise of these powers or for disregard of the provisions of the statute. When the board has accomplished its work and made its report to the minister, the legislation carries the matter no further and publicity is the only restraining force set in motion by the carrying out of the Act. The statute is limited in its operation to certain industries, namely, mines and those connected with public utilities, most of which are usually local and provincial.

"Dispute" and "industrial dispute" are defined as: "any dispute or differences between an employer and one or more of his employees, as to matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such violation thereof as constitutes an indictable offence)."

This is amplified by some further definitions so as to include, among other things, disputes as to wages, hours of employment, age, sex, qualification or status of employment and the mode, terms and conditions of employment, the dismissal of or refusal to employ any person or class of persons, as to materials alleged to be bad or unsuitable, and the interpretation of an agreement or a clause thereof.

Strikes and lockouts are defined as concerted cessation of work by employees or concerted refusal by employers to continue to employ any number of employees, provided, in each case, that this is done as a means of compulsion to accept terms of employment.

It is provided that no dispute shall be referred to a board where the employees affected are fewer in number than ten (section 21), and by section 6 the minister is obliged to establish the board if satisfied that the provisions of the Act apply. How he is to satisfy himself that there are at least ten persons affected is not stated.

Section 30 is as follows:—

"For the purpose of its inquiry the board shall have all the powers of summoning before it, and enforcing the attendance of witnesses, of administering oaths, and of requiring witnesses to give evidence on oath or on solemn affirmation (if they are persons entitled to affirm in civil matters) and to produce such books, papers or other documents or things as the board deems requisite to the full investigation of the matters into which it is inquiring, as is vested in any court of record in civil cases.

"2. Any member of the board may administer an oath, and the board may accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not."

By section 36, 37 and 38, failure to attend and produce books, documents, etc., refusal to give evidence, contempt of or in the face of the board and the hindering or obstruction of the board or any person authorized by it in entering premises where work is carried on and in interrogating persons therein are made offences punishable by the imposition of a money penalty to be enforced by proceedings under Part XV of the Criminal Code.

By section 56, strikes or lockouts are made unlawful prior to or during a reference to the board.

Section 57 is in part as follows:—

"Until the dispute has been finally dealt with by a board, and a copy of its report has been delivered through the registrar to both the parties affected, neither of those parties shall alter the conditions of employment with respect to wages or hours, or on account of the dispute do or be concerned in doing, directly or indirectly, anything in



the nature of a lockout or strike, or a suspension or discontinuance of employment or work, but the relationship of employer and employee shall continue uninterrupted by the dispute, or anything arising out of the dispute."

Any violation of these provisions subject the party offending to a fine to be recovered by proceedings under Part XV of the Criminal Code.

The salient features objected to are, therefore:—

(1) Compelling the parties, pending the making of the report, to abstain from anything altering their conditions of employment with respect to wages or hours, or from doing or being concerned in doing anything directly or indirectly in the nature of a lockout or strike or a suspension or discontinuance of employment of work, or in other words compulsion to maintain and not to terminate the relationship of employer and employee and to continue such relationship without any alteration of wages or hours.

(2) Compelling the parties to give evidence on oath and to produce their books, papers and documents in the same way and to the same extent as may be insisted on by any court of record in civil cases, and the evidence which the parties may be so compelled to give is not limited to such evidence as is legal evidence by the law of the province.

(3) Empowering the board and any persons authorized by them to enter the employer's premises and to inspect and view the work, material or machinery, etc., therein and to interrogate any person therein.

(4) These powers are not limited in their effect to the immediate parties to the dispute which is to be investigated. They deal with parties "affected" by the dispute, though not then actively concerned in it, and by sections 30, 32, 34, 35, 36, 37, 38 and 60, individuals, who need not be employers or employees, or affected by the dispute, are liable to be summoned, examined by the board and punished under the Criminal Code for so-called offences against its authority.

(5) The Act, by section 6, prohibits recourse to any court in the province, *inter alia*, to restrain the proceedings of the board.

(6) All the powers of the board and disobedience to the coercive provisions of the Act are reinforced by the imposition of penalties which are recoverable under the Criminal Code.

Broadly speaking, the fundamental and I think obvious objection to the sections of the Act which I have mentioned is that they attempt to compel employers and employees in each province to exercise, or abstain from exercising, their civil rights in the way Parliament desires and to suffer interference with their property and its enjoyment as therein provided, and to submit to inquiry, inspection and compulsion in connection therewith while denied access to the courts, although power is taken to interpret their agreement and contracts. And those not concerned in the dispute are made liable to be summoned, put on oath, interrogated and punished if necessary. The question is whether regulation and alteration of civil rights, or invasion of property rights, in this way, in order to bring about a uniform and desirable way of dealing with industrial disputes, while admirable in purpose, can be effective notwithstanding that the exercise in the province of these rights is committed to its care and forms part of its enumerated jurisdictions, and whether that control and interference is not in this case extended to those exercising what are really municipal functions.

The Act, not being predicated upon unusual industrial conditions or a national emergency, is sought to be justified as involving matters of "general Canadian interest and importance," an expression borrowed from Lord Watson. It is to be observed that its whole purpose is served if the dispute is suspended and hung up for a short time, till the board can ascertain the facts and make its report, after which the Act fails to provide for any sort of action in case the suggested consequence ensue. Is it possible, in the face of the views expressed by the Judicial Committee, to hold this particular statute, which so plainly

invades the specified domain of provincial legislation, yet deals with something so widespread and far reaching as to be a subject constitutionally proper for Dominion legislation, as coming within the expression "a still wider and legitimate purpose," which may properly be based on the provision regarding peace, order and good government?

Looking at the Act as a whole, it is clear that, in the absence of its compulsory provisions, both those coercive in their character and those imposing penalties, the working of the Act would be completely ineffectual.

A consideration of the cases decided from 1896 down to the present time leads me to think that, if governed literally by what is said in them, the question is not open. But in reality what is raised here has not to my mind been definitely considered in its present aspect and may require further examination.

That question is whether, when a subject is considered and it is found that its nature and characteristics make it desirable, as well as suitable, in the interest of the whole community, that it should be dealt with by some national measure, legislation to that end can be supported under the power to legislate for the peace, order and good government of the Dominion, although, apart from the desirability indicated by its character of having it treated as involving the national interest, it cannot, having regard to its immediate manifestations or the method in which it is proposed to deal with it, be regarded as other than of a local and private nature.

It cannot be denied, I think, that labour troubles spring up locally, affect at first local concerns, and can best be dealt with in a spirit of conciliation, which in itself involves local action. But they are likely, if not so dealt with, to spread, and so spreading might reasonably be said to affect the whole industrial fabric of the nation. They do not always do so, but the possibility can be clearly appreciated. Is it, therefore, while "a subject of Canadian interest and importance," one that is barred from action by the Parliament of Canada because it requires in its treatment the invasion of some provincial jurisdiction? One cannot but observe that there are many other and diverse subjects that might conceivably thus rise to national importance under certain social or political conditions, as, for example, religion, the spread of disease, conservation of natural resources, secret societies, and perhaps others. It is perhaps worthy of mention, as indicating that this subject has been regarded as one of a "local and private nature" in the province, that Ontario and several of the other provinces have on their statute books legislation much resembling this in principle and outline.

The case in hand raises the question I have mentioned very clearly, because, granting its national importance, the whole success of the operation of the legislation depends upon its being able to seize upon local disputes, local contracts and property, and upon local conditions, and to manage the exercise of civil rights in regard thereto, and subordinate them to the interests of the nation. Has the success of the experiment in such circumstances any bearing on the subject as indicating that it is of national importance?

In considering the cases beginning in 1896, the following seems to throw some light upon this aspect of the subject.

In *Russell v. The Queen* (1882) 7 A.C. 829, intemperance and the liquor traffic are likened to dealings in poisonous drugs, explosive substances, diseased meat, and classed with such acts as arson, or cruelty to animals, and, the subject-matter of the Act there considered being in that view, as it was said, outside provincial authority, the Act was held not to be one in relation to property or civil rights, but one dealing with public wrongs and so drawn into direct relation with criminal law.

This decision was, in *Attorney General for Canada v. The Attorney General for Alberta* (1916) 1 A.C. at p. 595, thus referred to:—



"There the court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this board makes it clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion. No doubt the Canada Temperance Act contemplated in certain events the use of different licensing boards and regulations in different districts and to this extent legislated in relation to local institutions. But the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose of *establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions*. The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction. There was a good deal in the Ontario Liquor License Act, and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell v. The Queen*. But in *Hodge v. The Queen* the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this board, though without giving reasons, that the Dominion licensing statute, known as the McCarthy Act, which sought to *establish a local licensing system for the liquor traffic throughout Canada*, was beyond the powers conferred on the Dominion Parliament by section 91. Their lordships think that, as the result of these decisions, it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Section 4 of the statute under consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russell v. The Queen*. No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the board from the Bar been well founded."

That explanation makes it clear that there the subject-matter of the legislation, namely, intemperance and the liquor traffic, lay outside provincial authority, and that the use of local institutions was subordinate to the wider purpose of prohibition which was held to be within Dominion legislative jurisdiction. What the *Russell* case insists upon is that a law placing restrictions upon the sale, etc., of intoxicating liquors is a law relating not to property or civil rights but to public order and safety which, it is said, is the primary matter dealt with. It is in that sense alone that it lay outside the provincial authority, which includes property, civil rights and matters of a local and private nature in the province. The *Alberta* case, which dealt with insurance contracts, seems to involve the proposition that the importance of the business of insurance, which had attained to great dimensions in Canada, did not bring it within the scope of the Dominion powers, because the Act dealt only with a widely spread business, but one having no relation in its operation, to the peace, order and good government of the Dominion. But the explanation of the *Russell* case and that case itself contain certain expressions which seem to justify my conclusion that this particular problem may or may not be intended to be covered by the definite restriction laid down in later cases to which I shall refer. To illustrate, I quote the following. In the *Russell* case, p. 838-9, Sir Montague Smith says:—

"What Parliament is dealing with in legislation of this kind" (i.e., an act restricting the sale or use of liquor as similar to articles dangerous to public safety) "is not a matter in relation to property and its rights, but one relating to *public order and safety*."

And again:—

"Laws of this nature designed for the promotion of *public order, safety, or morals* and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada."

In the later case in (1916) 1 A.C. 588, Lord Haldane, as already quoted, said, p. 596:—

"But the Judicial Committee appear to have thought this purpose" (i.e., the use of local institutions in licensing and regulating) "was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada except under restrictive conditions."

If, in the latter quotation, the words "for prohibiting strikes and lockouts throughout Canada except under restrictive conditions" are substituted for those referring to the liquor traffic, the analogy is obvious and something similar may be said about the other extract.

In the case of Attorney General for Ontario v. Attorney General for Canada (1896) A.C. 348, these words occur on p. 361:—

"Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion, but great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a *matter of national concern*, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature, but traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion".

But while that case suggests that some matters may, though local in their origin, attain dimensions so affecting the body politic of the Dominion as to justify Dominion legislation, it appears to me to lay down conditions which I think, taken literally, must for the present govern this branch of the case. It is there said,—

"These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada, by section 91, would, in their Lordship's opinion, *not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces*. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures".

That case, while conceding matters of unquestionable Canadian interest and importance, which would seem to include such a subject as industrial conditions and dangers, as affecting the "public order and safety," lays down as a qualification that legislation regarding such subjects "ought not to trench upon any of the classes specially confided to the provinces."

In the City of Montreal v. Montreal Street Ry. (1912) A.C. 333, the views quoted from the case in 1896 A.C. were affirmed. It was there discussed whether under the Dominion powers as to federal railways, it could exercise control over provincial railways by compelling the making of traffic arrangements with those under the jurisdiction of Parliament. Lord MacNaghten said:—



"It cannot be held, their Lordships think, that it is necessarily incidental to the exercise by the Dominion Parliament of its control over federal railways that provincial railways should be coerced by its legislation to enter into these agreements in the manner in which it sought to coerce the street railway company in the present case to enter into the agreements specified in the order appealed from . . . . In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unauthorized invasion of the rights of the legislature of the province of Quebec".

In *Attorney General for Australia v. Colonial Sugar Co.* (1914) A.C. p. 252, Lord Haldane sums up the earlier pronouncements in these words:—

"By the 91st section a general power was given to the new Parliament of Canada to make laws for the peace, order and good government of Canada without restriction to specific subjects, and *excepting only the subjects specifically and exclusively assigned to the provincial legislatures by section 92.*"

In *Attorney General for Canada v. Attorney General for Alberta* (ante) the matter was again considered and Lord Haldane said (p. 595):—

"It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of section 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in section 92. There is only one case, outside the heads enumerated in section 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is *where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under section 92.* *Russell v. The Queen* is an instance of such a case."

I find these careful pronouncements by Lord Haldane to be reinforced in the *Board of Commerce* and the *Fort Frances* cases (ante).

In *Attorney General v. Manitoba License Holders' Association* (1902) A.C. p. 77, Lord MacNaghten points out that local legislation is not to be deemed *ultra vires* because it may have effect outside the limits of the province, and adds:—

"On the one hand, according to *Russell v. Reg.* (ante) it is competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the Dominion and when duly brought into operation in any particular district deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, order and good government of Canada."

He also says that,—

"In the opinion of this tribunal matters which are 'substantially of local or of private interest' in a province—matters which are of a local or private nature 'from a provincial point of view,' to use expressions to be found in the judgment—are not excluded from the category of 'matters of a merely local or private nature,' because legislation dealing with them, however carefully it may be framed, *may or must have an effect outside the limits of the province*, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."

I cannot but regard these decisions as laying down a rule which must, until circumscribed by the Judicial Committee, govern this case; and that rule is to confine the powers of the Dominion Parliament in its action, under the provision as to the peace, order and good government of the Dominion, to such matters of Canadian interest and importance as can be dealt with, without trenching upon any of the subjects specially reserved to the provinces. If it does encroach, then it is not to the extent to which it thus offends, competent legislation for the peace, order and good government of Canada.

I do not think the considerations I have mentioned warrant us in departing from this rule of construction, as it is clear and distinct. Nor are the merits of the question in any way enlarged by the fact that persons in more than one province are or may be affected by the dispute. This is not in itself sufficient

to justify Dominion interference if the operation of the statute affects property and civil rights in the province in which the dispute originates or to which it spreads.

So far as appears from the pleadings and evidence, this Act affects the respondent commission, which only operates in this province, and is constituted to carry out operations properly belonging to the spheres of municipal action. This forms another and important objection, as the Act interferes with what is in effect the right of the province to form and control municipal institutions, and appears to trench upon what is of a local and private nature within the province. The legal remedy sought by this commission, namely, an injunction restraining the members of the board from certain activities, may not involve all the matters referred to as important in considering the scope of the Act. But as the Act must "be scrutinized in its entirety" (*Great West Saddlery Company v. The King* (1921) 2 A.C. 117), the considerations I have discussed must be given weight to in determining the real scope and effect of the Act.

We are not called on to determine whether the Dominion jurisdiction as to railways, other than those under provincial control, or as to shipping and navigation, will preserve this Act in its relation to railway employees or those engaged in such shipping as may be considered a public utility.

It remains to be considered whether, under the powers respecting "trade or commerce," or "criminal law," this Act may be upheld. The case of *Citizens Insurance Co. v. Parsons* (1881) 7 A.C. 96, at p. 113, shows how wide a definition may be given to "trade and commerce." But even that definition does not touch this case, being limited to (1) political arrangements in regard to trade, requiring parliamentary sanction, (2) regulation of trade in matters of inter-provincial concern, and (3) general regulation of trade affecting the whole Dominion. The relations of employer and employee, resulting in the production of articles which are the subjects of trade, and the use of property for that purpose, are not what is meant by the enumerated power referred to, which is directed, among other things, to the movement and interchange of commodities and their purchase and sale, but not to their production or manufacture, or any of the conditions dealt with by this Act, which result in that production.

I should hesitate to hold that jurisdiction could be founded on that expression so as to comprehend whatever makes trade and commerce possible. And this seems to be the effect of including, as arising out of or belonging to the domain of trade or commerce as commonly understood or defined, disputes between owners or operators of mining properties and of electric light, gas, water and power works and any group of persons, etc., acting together and whom the Minister of Labour considers to have interests in common.

Nor can I assent to the view that, if the real purpose and intent of an Act is to be found in relation to the peace, order and good government of the Dominion under the general power, and it invades provincial jurisdiction, it can be supported as one whose pith and substance has relation to "trade and commerce." Many acts relating to trade and commerce assist in preserving peace and order and aid in maintaining good government, but their constitutional validity must depend on one or other power, in which case different considerations at once arise according to which power is invoked.

In regard to the criminal law, it was urged in the latest case, *Attorney General of Ontario v. Reciprocal insurers* (not yet reported), that if the true character of the section, 508 (c), was one regulating the exercise of civil rights, thus infringing the provincial jurisdiction, yet, the authority of Parliament in regard to criminal law being unlimited, it was valid as creating a crime. This device was rejected by the Judicial Committee on the ground earlier stated by Lord Haldane in the *Board of Commerce* case.

Mr. Justice Duff, in the *Reciprocal Insurance* case, says:—



"The claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the provinces, in respect of which exclusive jurisdiction is given to the provinces, under section 92, by the device of declaring those persons to be guilty of a criminal offence who, in the exercise of such rights, do not observe the conditions imposed by the Dominion. Obviously the principle contended for ascribes to the Dominion the power, in execution of its authority under section 91 (27), to promulgate and to enforce regulations controlling such matters as, for example, the solemnization of marriage, the practice of the learned professions and other occupations, municipal institutions, the operation of local works and undertakings, the incorporation of companies with exclusively provincial objects—and superseding provincial authority in relation thereto. Indeed, it would be difficult to assign limits to the measure in which, by procedure strictly analogous to that followed in this instance, the Dominion might dictate the working of provincial institutions and circumscribe or supersede the legislative and administrative authority of the provinces.

"Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian constitution as enumerated and established by the judgments of this board. The language of sections 91 and 92 (which establish 'interlacing and independent legislative authorities,' *Great West Saddlery v. The King*, *supra*) being popular rather than scientific, the necessity was recognized at an early date of construing words describing a particular subject-matter by reference to the other part of both sections. As Sir Montague Smith observed, in a well-known passage in the judgment in *Citizens Insurance Company v. Parsons*, 7 A. C. at p. 109, 'The two sections must be read together and the language of one interpreted and, where necessary, modified by that of the other.' The scope of the powers received by the Dominion under item 27, section 91, is not to be ascertained by obliterating the context, in which the words are placed, in disregard to this rule."

If, therefore, this legislation is one substantially in relation to property and civil rights, this case applies and governs here.

I very much regret having to arrive at a conclusion adverse to the validity, in so far as it affects the respondent commission, of this Act. It has been a successful experiment in warding off industrial difficulties in many cases, all the more to be recognized in view of one of its provisions possibly thought to be unavoidable. Its capacity for service would, in my humble judgment, have been enhanced if it had provided an absolutely independent tribunal, instead of one in which two of the members are almost necessarily imbued with opposing views, and nominated by the contending parties. As its function is delay, consideration and publicity, its present shape practically compels the parties and the public to rely upon one member of the board who may happen to be chosen by the other two, and whose views may possibly be detached, from the prepossessions of either side.

I think the appeal must be dismissed with costs and judgment entered for the respondents in the action, in accordance with these reasons, for the relief they seek, with costs.

#### IV.—JUDGMENT OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

##### PRIVY COUNCIL APPEAL NO. 99 OF 1924

The Toronto Electric Commissioners, Appellants, v. Colin G. Snider and others, Respondents, and The Attorney General of Canada and the Attorney General of Ontario, Interveners, from The Appellate Division of the Supreme Court of Ontario.

Judgment of the Lords of the Judicial Committee of the Privy Council, delivered the 20th January, 1925.

Present at the Hearing: Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Wrenbury, Lord Salvesen.

*(Delivered by Viscount Haldane)*

It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty incumbent on the Judicial Committee, now as always, is simply to interpret the British North America Act and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of section 91 of that Act. In this case the Judicial Committee have come to the conclusion that it was not. To that conclusion they find themselves compelled, alike by the structure of section 91 and by the interpretation of its terms that has now been established by a series of authorities. They have had the advantage not only of hearing full arguments on the question, but of having before them judgments in the Courts of Ontario, from which this appeal to the Sovereign in Council came directly. Some of these judgments are against the view which they themselves take, others are in favour of it, but all of them are of a high degree of thoroughness and ability.

The particular exercise of legislative power with which their Lordships are concerned is contained in a well-known Act, passed by the Dominion Parliament in 1907 and known as The Industrial Disputes Investigation Act. As it now stands it has been amended by subsequent Acts, but nothing turns, for the purposes of the question now raised, on any of the amendments that have been introduced.

The primary object of the Act was to enable industrial disputes between any employer in Canada and any one or more of his employees, as to "matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such violation thereof as constitutes an indictable offence)", relating to wages or remuneration, or hours of employment; sex, age or qualifications of employees, and the mode, terms and conditions of employment; the employment of children or any person, or classes of persons; claims as to whether preference of employment should be given to members of labour or other organizations; materials supplied or damage done to work; customs or usages, either general or in particular districts; and the interpretation of agreements. Either of the parties to any such dispute was empowered by the Act to apply to the Minister of Labour for the Dominion for the appointment of a Board of Conciliation and Investigation, to which Board the dispute might be referred. The Act enabled the Governor in Council to appoint a Registrar of such Boards, with the duty of dealing with all applications for reference, bringing them to the notice of the Minister, and conducting the correspondence necessary for the constitution of the Boards. The Minister was empowered to establish a Board when he thought fit, and no question was to be raised in any Court interfering with his decision.



Each Board was to consist of three members to be appointed by the Minister, one on the recommendation of the employer, one on that of the employees, and the third, who was to be Chairman, on the recommendation of the members so chosen. If any of them failed in this duty the Minister was to make the appointment. The department of the Minister of Labour was to provide the staffs required. The application for a Board was to be accompanied by a statutory declaration showing that, failing adjustment, a lockout or strike would probably occur.

The Board so constituted was to make inquiry and to endeavour to effect a settlement. If the parties came to a settlement the Board was to embody it in a memorandum of recommendation, which, if the parties had agreed to it in writing, was to have the effect of an award on a reference to arbitration or one made under the order of a court of record. In such a case the recommendation could be constituted a rule of Court and enforced accordingly. If no such settlement was arrived at, then the Board was to make a full report and a recommendation for settlement to the Minister, who was to make it public.

The Boards set up were given powers to summon and to enforce the attendance of witnesses, to administer oaths and to call for business books and other documents, and also to order into custody or subject to fine, in case of disobedience or contempt. The Board was also empowered to enter any premises where anything was taking place which was the subject of the reference and to inspect. This power was also enforceable by penalty. The parties were to be represented before the Board, but no counsel or solicitors were to appear excepting by consent and subject to the sanction of the Board itself. The proceedings were normally to take place in public.

By section 56 of the Act, in the event of a reference to a Board, it was made unlawful for the employer to lock out or for the employees to strike on account of any dispute prior to or pending the reference, and any breach of this provision was made punishable by fine. By section 57, employers and employed were both bound to give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours. In the event of a dispute arising over the intended change, until the dispute had been finally dealt with by a Board and a report had been made, neither employers nor employed were to alter the conditions, or lock out or strike, or suspend employment or work, and the relationship of employer and employee was to continue uninterrupted. If, in the opinion of the Board, either party were to use this or any other provision of the Act for the purpose of unjustly maintaining a given condition of affairs through delay, and the Board were so to report to the Minister, such party was to be guilty of an offence and liable to penalties.

By section 63 (a), where a strike or lockout had occurred or was threatened, the Minister was empowered, although neither of the parties to the dispute had applied for one, to set up a Board. He might also, under the next section, without any application, institute an inquiry.

Whatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any province was concerned, by the provincial legislature under the powers conferred by section 92 of the British North America Act. For its provisions were concerned directly with the civil rights of both employers and employed in the province. It set up a Board of Inquiry which could summon them before it, administer to them oaths, call for their papers and enter their premises. It did no more than what a provincial legislature could have done under head 15 of section 92, when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights. It interfered further with civil rights when, by section 56, it suspended liberty to lock out or strike during a reference to a Board. It does not appear that there is anything in the Dominion Act which could not have been enacted by the Legislature of Ontario, excepting one provision. The field for the operation of the Act was made the whole of Canada.

In 1914 the Legislature of the province of Ontario passed a Trade Disputes Act which substantially covered the whole of these matters, so far as Ontario was concerned, excepting in certain minor particulars. One of these was the interference in the Dominion Act with the right to lock out or strike during an inquiry. This was not reproduced in the Ontario Act. Another difference was the necessary one that the operation of the Ontario Act was confined to that province, instead of extending to other parts of Canada. It was, of course, open to the legislatures of the other provinces to enact similar provisions, and some of them appear to have done so.

Subject to variations such as these there is, in the Ontario Act, little alteration in substance of the provisions of the Dominion statute. The Lieutenant-Governor of the Provincial Council, instead of the Minister of Labour, appoints the Registrar. There are to be set up two different kinds of statutory Council, one of Conciliation, the four members of which are to be nominated by the parties, the other a Council of Arbitration, consisting of three members, two of whom are to be appointed by the Lieutenant-Governor of the province on the recommendation of the parties, and the third, the chairman, to be nominated by the Lieutenant-Governor on failure of the parties to agree and name. The Mayor of any city or town in the province, on being notified that a strike or lockout is impending, may inform the Registrar of the fact, and a Council of Arbitration may then be empowered to inquire and to mediate. Unless there is an agreement by one or both of the parties, in which case the award of the Council may be enforced as on an arbitration, there is no power given to suspend the right to strike or lock out.

It is clear that this enactment was one which was competent to the legislature of a province under section 92. In the present case the substance of it was possibly competent, not merely under the head of property and civil rights in the province but also under that of municipal institutions in the province. For the appellants are incorporated, by the province, a public utility commission within the definition in chapter 204 of the Revised Statutes of Ontario, 1914, relating to the constitution and operation of works for supplying public utilities by municipal corporations and companies, and are employers within the meaning of the Ontario Trade Disputes Act already referred to. Their function is to manage the municipal electric light, heat and power works of the city of Toronto.

The primary respondents in this appeal are the members of a Board of Conciliation appointed by the Dominion Minister of Labour under the Act first referred to. There was a dispute in 1923 between the appellants and a number of the men whom they employed, which dispute was referred to the first respondents, who proceeded to exercise the powers given by the Dominion Act. The appellants then commenced an action in the Supreme Court of Ontario for an injunction to restrain these proceedings, on the allegation that the Dominion Act was *ultra vires*. The Attorneys General of Canada and of Ontario were notified and made parties as intervenants.

There was a motion for an interim injunction, which was heard by Orde, J., who, after argument, granted an injunction till the trial. The action was tried by Mowat, J., who intimated his dissent from the view of the British North America Act taken by Orde, J., who was co-ordinate in authority with him, according to which view the Dominion Act was *ultra vires*. He, therefore, as he had power by the Provincial Judicature Act to do, directed the action to be heard by a Divisional Court, and it was ultimately heard by the Appellate Division of the Supreme Court of Ontario (Mulock, C. J., Magee, Hodgins, Ferguson and Smith, J. J. A.). The result was that by the majority (Hodgins J. A., dissenting) the action of the appellants was dismissed.

The broad grounds of the judgment of the majority, which will be referred to later on, was that the Dominion Act was not a law relating to matters as to



which section 92 conferred exclusive jurisdiction, but was a law within the competence of the Dominion Parliament, inasmuch as it was directed to the regulation of trade and commerce throughout Canada, and to the protection of the national peace, order and good government, by reason of (a) confining, within limits, a dispute which might spread over all the provinces; (b) informing the general public in Canada of the nature of the dispute, and (c) bringing public opinion to bear on it. The power of the Dominion Parliament to legislate in relation to criminal law, under head 27 of section 91, was also considered to apply.

Before referring to these grounds of judgment their Lordships, without repeating at length what has been laid down by them in earlier cases, desire to refer briefly to the construction which, in their opinion, has been authoritatively put on sections 91 and 92 by the more recent decisions of the Judicial Committee. The Dominion Parliament has, under the initial words of section 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the Provinces by section 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in section 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within section 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in section 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of section 91.

Applying this principle, does the subject of the legislation in controversy fall fully within section 92? For the reasons already given their Lordships think that it clearly does. If so, is the exclusive power *prima facie* conferred on the Province trenching on by any of the overriding powers set out specifically in section 91? It was, among other things, contended in the argument that the Dominion Act now challenged was authorized under head 27, "the Criminal Law except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." It was further suggested in the argument that the power so conferred is aided by the power conferred on the Parliament of Canada to establish additional Courts for the better administration of the laws of Canada.

But their Lordships are unable to accede to these contentions. They think that they cannot now be maintained successfully, in view of a series of decisions in which this Board has laid down the interpretation of section 91 (27) in the British North America Act on the point. In the most recent of these cases, that of the Reciprocal Insurers (1924) A. C. 328, at p. 342, Mr. Justice Duff stated definitely the true interpretation, in delivering the judgment of the Judicial Committee. Summing up the effect of the series of previous decisions relating to the point, he said:—

"In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under section 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the provinces, it cannot be upheld as valid."

In the earlier Board of Commerce case (1922) A.C. 191 the principle to be applied was laid down in the same way. It was pointed out that the Dominion had exclusive legislative power to create new crimes "where the subject-matter is one which, by its very nature, belongs to the domain of criminal jurisprudence." But "it is quite another thing, first to attempt to interfere with a class of subject

committed exclusively to the provincial legislature, and then to justify this by enacting ancillary provisions designated as new phases of Dominion criminal law, which require a title to so interfere as the basis of their application."

Their Lordships are of opinion that, on authority as well as on principle, they are to-day precluded from accepting the arguments that the Dominion Act in controversy can be justified as being an exercise of the Dominion power under section 91 in relation to criminal law. What the Industrial Disputes Investigation Act, which the Dominion Parliament passed in 1907, aimed at accomplishing was to enable the Dominion Government to appoint anywhere in Canada a Board of Conciliation and Investigation to which the dispute between an employer and his employees might be referred. The Board was to have power to enforce the attendance of witnesses and to compel the production of documents. It could under the Act enter premises, interrogate the persons there, and inspect the work. It rendered it unlawful for an employer to lock out or for a workman to strike, on account of the dispute, prior to or during the reference, and imposed an obligation on employees and employers to give thirty days' notice of any intended change affecting wages or hours. Until the reference was concluded neither were to alter the conditions with respect to these. It is obvious that these provisions dealt with the civil rights, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalties for breach of the restrictions did not render the statute the less an interference with civil rights in its pith and substance. The Act is not one which aims at making striking generally a new crime. Moreover, the employer retains under the general common law a right to lock out, only slightly interfered with by the penalty. In this connection their Lordships are therefore of opinion that the validity of the Act cannot be sustained.

The point was also put in a somewhat different form. It was said that the criminal law in Canada was in its foundation the criminal law of England as at 17th September, 1792; that, according to the criminal law of England as at that date, a strike was indictable as a conspiracy; that, consequently strikes were within the ambit of the criminal law; and that, as a law either declaring strikes illegal as at common law, or making them illegal, would be a proper enactment of the criminal law, so, though this is rather a *non-sequitur*, it was only a branch of that law to enact provisions which should have the effect of preventing strikes coming into existence.

It is not necessary to investigate or determine whether a strike is *per se* a crime according to the law of England in 1792. A great deal has been said on the subject and contrary opinions expressed. Let it be assumed that it was. It certainly was so only on the ground of conspiracy. But there is no conspiracy involved in a lockout; and the statute under discussion deals with lockouts *pari ratione* as with strikes. It would be impossible, even if it were desirable, to separate the provisions as to strikes from those as to lockouts so as to make the one fall under the criminal law while the other remained outside it; and, therefore, in their Lordships' opinion this argument also fails.

Nor does the invocation of the specific power in section 91 to regulate trade and commerce assist the Dominion contention. In *Citizens Insurance Company v. Parsons* (7 A.C. at p. 112) it was laid down that the collocation of this head (No. 2 of section 91), with classes of subjects enumerated of national and general concern, indicates that what was in the mind of the Imperial Legislature when this power was conferred in 1867 was regulation relating to general trade and commerce. Any other construction would, it was pointed out, have rendered unnecessary the specific mention of certain other heads dealing with banking, bills of exchange and promissory notes, as to which it had been significantly deemed necessary to insert a specific mention. The contracts of a particular trade or business could not, therefore, be dealt with by Dominion legislation so as to conflict with the powers assigned to the provinces over



property and civil rights relating to the regulation of trade and commerce. The Dominion power has a really definite effect when applied in aid of what the Dominion Government are specifically enabled to do independently of the general regulation of trade and commerce, for instance, in the creation of Dominion companies with power to trade throughout the whole of Canada. This was shown in the decision in *John Deere Plow Company v. Wharton* (1915) A.C., at p. 340. The same thing is true of the exercise of an emergency power required as on the occasion of war, in the interest of Canada as a whole, a power which may operate outside the specific enumerations in both section 91 and 92. And it was observed in the *Alberta* case, in reference to attempted Dominion legislation about insurance, that it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation, for instance, by a licensing system, of a particular trade in which Canadians would otherwise be free to engage in the provinces (see (1916) 1 A.C. at p. 596). It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in section 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces.

A more difficult question arises with reference to the initial words of section 91, which enable the Parliament of Canada to make laws for the peace, order and good government of Canada in matters falling outside the provincial powers specifically conferred by section 92. For *Russell v. The Queen* (7 A.C., 829) was a decision in which the Judicial Committee said that it was within the competency of the Dominion Parliament to establish a uniform system for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. It has been observed subsequently by this Committee that it is now clear that it was on the ground that subject-matter lay outside provincial powers, and not on the ground that it was authorized as legislation for the regulation of trade and commerce, that the Canada Temperance Act was sustained (see the *Alberta* case (1916) 1 A.C., at p. 595). But even on this footing it is not easy to reconcile the decision in *Russell v. The Queen* with the subsequent decision in *Hodge v. The Queen* (9 A.C. 117) that the Ontario Liquor License Act, with the powers of regulation which it entrusted to local authorities in the province, was *intra vires* of the Ontario Legislature. Still more difficult is it to reconcile *Russell v. The Queen* with the decision given later by the Judicial Committee that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout the Dominion, was *ultra vires* of the Dominion Parliament. As to this last decision it is not without significance that the strong Board which delivered it abstained from giving any reasons for their conclusion. They did not in terms dissent from the reasons given in *Russell v. The Queen*. They may have thought that the case was binding on them as deciding that the particular Canada Temperance Act of 1886 had been conclusively held valid, on the ground of fact that at the period of the passing of the Act the circumstances of the time required it in an emergency affecting Canada as a whole. The McCarthy Act, already referred to, which was decided to have been *ultra vires* of the Dominion Parliament, was dealt with in the end of 1885. Ten years subsequently another powerful Board decided the case of the Attorney-General for Ontario v. Attorney-General for the Dominion and the Distillers' and Brewers' Association (1896) A.C. 348. Lord Herschell and Lord Davey, who had been the leading counsel in the McCarthy case, sat on that Board, along with Lord Halsbury, who had presided at it. In delivering the judgment, Lord Watson used in the latter case significant language:—

"The judgment of this Board in *Russell v. Regina*, has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order and good government of Canada in such a sense as to bring its provisions within the competency of the Canadian Parliament."

That decision, he said, must be accepted as an authority to the extent to which it goes, namely, that

"the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order and good government of Canada."

The Board held that, on that occasion, they could, not inconsistently with *Russell v. The Queen*, declare a statute of the Ontario Legislature establishing provincial liquor prohibitions to be within the competence of a provincial legislature, provided that the locality had not already adopted the provisions of the Dominion Act of 1886.

It appears to their Lordships that it is not now open to them to treat *Russell v. The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in section 91. Unless this is so, if the subject-matter falls within any of the enumerated heads in section 92, such legislation belongs exclusively to provincial competency. No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive provincial competency. Such cases may be dealt with under the words at the commencement of section 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in the *Fort Frances Pulp case* (1923) A. C. 695, are highly exceptional. Their Lordships think that the decision in *Russell v. The Queen* can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of section 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell v. The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous. It is plain from the decision in the Board of Commerce case that the evil of profiteering could not have been so invoked; for provincial powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell v. The Queen* as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law.

The judgments in the Court below express differing views. Orde, J., granted an interim injunction, restraining the first respondents from interfering with the business of the appellants and from entering on their premises, or examining their works or employees, and from exercising their compulsory powers as a Board of Conciliation and Investigation under the Dominion Act, and from interfering with the property and civil or municipal rights of the appellants. He held that the Dominion legislation interfered with provincial rights under section 92 in a fashion which could not be supported under any of the enumerated heads in section 91, and therefore could not be sustained by invoking the general words with which that section commences. The decision in the *Fort Frances Pulp case* (*ubi supra*) afforded no analogy on which such a contention as this last could be based.

Mowat, J., dissenting from this reasoning, referred the trial of the action to a Divisional Court. He thought that the legislation in question was a matter of national importance, dealing with a subject which affected the body politic of the Dominion, as in *Russell v. The Queen* (*ubi supra*).



In the Appellate Division, Mulock, C. J., Smith, J. A., and Magee J. A., concurred in the judgment delivered by Ferguson, J. A. That learned Judge held that the Act in question was not, "in its pith and substance," an Act relating to merely provincial matters falling within section 92, but related to industrial disputes which might develop into disputes affecting, not only the immediate parties, but the national welfare, peace, order and safety. He cited the analogy of the Australian Constitution Act, which, by section 51, placed such disputes within the competence of the Australian Parliament when they extended beyond the limits of any single state. He was of opinion that, even if the Dominion legislation actually interfered with provincial powers, it might be supported if necessary as dealing with the interest of the peace, order and good government of Canada, but he thought that it was not necessary to go further in point of principle than to treat *Russell v. The Queen* (*ubi supra*) as showing that, where an abnormal condition in a great emergency demanded it, the Parliament of Canada might legislate for such a case without even trenching on the powers allocated to the Provinces under section 92. He also thought that the Act was not one to control or regulate contractual or civil rights, but that its object was to authorize inquiry into conditions or disputes, and that the prevention of crimes, the protection of public safety, peace and order, and the protection of trade and commerce, were of its pith and substance and paramount purpose. The Act could also be supported as Dominion legislation under the overriding enumerated heads of section 91, as being legislation in relation to the regulation of trade and commerce, and also to the criminal law.

Hodgins, J. A., dissented. In his view industrial strife was nothing more than the result of an undesirable use of the civil right to cease work in the operation of various businesses. The argument in support of the Act was practically an endeavour to invent a new field, which was only a department or development of one of those exclusively possessed by provincial legislatures. Nor was the matter made better by the contention that the Act, when examined in the light of evidence adduced, dealt with a subject which transcended provincial limits and was of Dominion importance. It was, no doubt, true that, owing to the highly organized methods of modern labour, strikes might spread and extend to other businesses. This might happen, and the state of things might conceivably reach a height in which it became comparable to war, famine, or rebellion, and justify Dominion action. But on the only facts proved, in the learned Judge's view, this Act could not be supported as dealing with a case of (1) emergency, or (2) general Canadian interest and importance, or (3) with a power conferred under any of the enumerated heads in section 91. No great national emergency was shown to have existed when the statute was enacted in 1907, or to have occurred since, and the statute was not framed so as to come into operation only when such emergency arose. The statute was further not framed so as to confer the drastic powers that would be necessary in such a case, but was based on the normal working of industrial relations which often required time and patience and some restraint if dislocation was to be avoided. It was essentially a relative measure. The special and exceptional conditions of emergency required by the judgments in the Board of Commerce and Fort Frances Pulp cases (*ubi supra*) did not appear to him to have existed in point of fact. So far as anticipations of changes in the future were concerned, Hodgins, J. A., thought that the question was whether regulation of civil rights or invasion of property rights in the fashion provided by the Act, in order to bring about a uniform and desirable method of dealing with industrial disputes, admirable as its purpose might be, could be valid in view of the exercise of the powers given to the provinces. That the provinces had such powers, as complete as those in this Act given to the Dominion, he entertained no doubt. Several provinces had on their statute books legislation of much the same kind. Even granting the national importance of the question, the whole success of this

method of dealing with it depended on the capacity to seize on local disputes and their conditions, and to manage the exercise of civil rights in relation to them. The circumstance that the dispute might spread to other provinces was not enough in itself to justify Dominion interference, if such interference affected property and civil rights. The province in the present case was simply the scene of municipal action. As the result of his consideration of the principles laid down for the interpretation of the British North America Act, the learned Judge was of opinion that the Act could not stand.

Their Lordships have examined the evidence produced at the trial. They concur in the view taken of it by Hodgins, J. A. They are of opinion that it does not prove any emergency putting the national life of Canada in unanticipated peril such as the Board which decided *Russell v. The Queen* may be considered to have had before their minds.

As the result of consideration, their Lordships have come to the conclusion that they ought humbly to advise the Sovereign that the appeal should be allowed, and that judgment should be entered for the appellants for the declaration and injunction claimed. There should be no costs, either of this appeal or in the Courts below and any costs paid under the judgment of the Appellate Division of the Supreme Court ought to be repaid.



# V.—CASE FOR THE APPELLANTS BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

## IN THE PRIVY COUNCIL

No. 99 of 1924

*On Appeal from the Appellate Division of the Supreme Court of Ontario*

BETWEEN TORONTO ELECTRIC COMMISSIONERS, (*Plaintiffs*) *Appellants*, AND COLIN G. SNIDER, J. G. O'DONOGHUE AND F. H. MCGUIGAN, (*Defendants*) *Respondents*, AND THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO, *Intervenants*.

## CASE FOR THE APPELLANTS

1. This is an appeal by special leave from the judgment of the Appellate Division of the Supreme Court of Ontario dated the 22nd day of April, 1924, dismissing by a majority of four to one the appellants' action, on a reference to that court by the trial judge (Mowat J.) under section 32 of the Judicature Act, R.S.O., chap. 56, subsections 3 and 4 which read:—

(3) If a judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court he may refer the case before him to a Divisional Court.

(4) Where a case is so referred it shall be set down for hearing and notice of hearing shall be given in like manner as in the case of an appeal to a Divisional Court.

2. The question in dispute is whether a Dominion statute "to aid in the prevention and settlement of strikes and lockouts in mines and industries connected with public utilities" and known as "The Industrial Disputes Investigation Act 1907" 6 and 7 Edward VII., chapter 20, with the amendments thereto (hereinafter referred to as "The Industrial Disputes Act") is within the powers of the Parliament of Canada having regard to the provisions of section 91 and 92 of the British North America Act.

The Industrial Disputes Act and sections 91 and 92 of the British North America Act and the Acts constituting the appellants are printed in the joint appendix.

3. The appellants are a Board of Commissioners appointed under the provisions of section 16 and 17 of 1 George V, chapter 119 (Ontario) [an Act respecting the City of Toronto] to manage the Municipal Electric Light, Heat and Power Works of the city of Toronto, having the duties and powers of commissioners under the Public Utilities Act, R.S.O. (1914), chapter 204, and by section 34, subsection (2) and section 36, subsection (1) of the last mentioned Act, the appellants are a body corporate.

4. The appellants in managing and operating the said Electric Light, Heat and Power Works of the municipality of the city of Toronto employ linemen, line foremen, and other mechanics and workmen, said to be members of the Canadian Electrical Trades Union, Toronto Branch.

5. On or about the 22nd day of June, 1923, James T. Gunn and George W. McCollum, describing themselves as business manager and financial secretary, respectively, of the Canadian Electrical Trades Union, Toronto Branch, and as alleged by them on the authority of a vote of the majority of the members of the said Trades Union Branch, made an application in writing to the Registrar for the appointment of a board under the Industrial Disputes Act alleging in the said application a dispute between the appellants and the said Trades Union Branch over the wages and working conditions of the employees.

6. The Deputy Minister of Labour, by letter dated the 25th day of June, 1923, notified the appellants of the said application and in pursuance of the practice of the Department of Labour, asked the consent of the appellants to the establishment of a board so that no question of jurisdiction under the Industrial Disputes Act should arise. After some correspondence between the appellants and the Minister of Labour or the Department of Labour the appellants declined to proceed under the Industrial Disputes Act. The appellants were advised by the Deputy Minister of Labour in a telegram dated the 24th day of July, 1923, that the Minister of Labour had that day formally established a Board of Conciliation and Investigation under the Industrial Disputes Act, and had appointed as a member of the board on the recommendation of the employees, the Respondent Defendant J. G. O'Donoghue and the appellants were asked to recommend some person for appointment as a member of the said board on their behalf. The appellants declined to make any recommendation and by letter dated the 30th July, 1923, the Deputy Minister of Labour and Registrar informed the appellants that the minister acting under section 8 of the Industrial Disputes Act had appointed the Respondent F. H. McGuigan as a member of the board on the appellants' behalf. Finally the appellants were advised by telegram from the Deputy Minister of Labour and Registrar dated the 1st day of August, 1923, that the Minister of Labour had appointed the Respondent Colin G. Snider as chairman of the board upon the joint recommendation of the Respondents O'Donoghue and McGuigan. Each of the respondents accepted his said appointment and the respondents proceeded to act as a board under the Industrial Disputes Act.

7. At the first meeting of the said board called for and held on the 7th day of August, 1923, the appellants appeared by counsel and objected to the establishment of the board on the ground that the Industrial Disputes Act is not within the powers of the Dominion Parliament and that in any case the Minister of Labour had no jurisdiction to apply the said Act to the appellants who were managing the property of the municipality of the city of Toronto in the operation of a public utility of the municipality, namely, the distribution of light, heat and power within that municipality.

8. The Board of Conciliation and Investigation at a meeting on the following day, the 8th day of August, adjourned until the 20th day of August for the purpose of communicating with the department and determining upon the course they should pursue, and on the said last mentioned date the chairman of the said board announced that the board would proceed forthwith under the Industrial Disputes Act, and subsequently upon the same day the appellants were served with the notice of appointment to proceed.

9. On the 21st day of August, 1923, the appellants commenced this action by writ of summons bearing that date and claimed a declaration that the respondents were acting without lawful authority as a board under the Industrial Disputes Act and its amendments in respect of the alleged dispute between the appellants and certain of their employees and an injunction and upon application of the appellants and notice to the respondents and the Attorney-General of Canada and the Attorney-General of Ontario, all parties, except the Attorney-General for the Dominion of Canada, being represented upon the hearing, an interim injunction was granted by the Honourable Mr. Justice Orde on the 29th day of August, 1923, restraining the respondents until the trial or other final disposition of the action from interfering with the business of the appellants and from entering upon their premises or of examining their works or employees upon their premises and from exercising any of the compulsory powers contained in sections 30, 31, 32, 33, 34, 35, 36, 37 and 38 of the Industrial Disputes Act or any of the compulsory powers conferred by the said Act or any amendments thereto upon the respondents as a Board of Conciliation and Investigation under



the said Act, and from interfering in any way with the property and civil rights or the municipal rights of the appellants.

10. The Honourable Mr. Justice Orde delivered a considered judgment upon the said application in which he stated that:—

The Act in question here, in my judgment, purports to interfere in the most direct and positive manner with the civil rights of employers and employees, and also with the municipal institutions of this province, both subject matters of legislation exclusively assigned to the provinces by numbers 8 and 13 of the subjects enumerated in section 92 (B.N.A. Act). That the operation of an electric lighting, heating and power system for municipal purposes is within the competence of a provincial legislature was held by a Divisional Court in *Smith v. City of London* (1909) 20 O.L.R. 133, and the system is none the less a municipal one merely because it is operated by a commission having a separate corporate existence, but nevertheless a distinct department of the municipal government of the city of Toronto constituted by special legislation, for that purpose, of the provincial legislature.

11. Pleadings were thereupon delivered in the action the appellants taking the ground that the Industrial Disputes Act is not within the powers conferred on the Parliament of Canada by the British North America Act because (1) it deals with property and civil rights, one of the classes of subjects (class 13) exclusively assigned to the provincial legislature by section 92 of the British North America Act and (2) it interferes with municipal institutions and is an interference with a local work or undertaking, subjects (classes 8 and 10) exclusively assigned to the provincial legislatures by section 92 of the British North America Act.

12. The action was tried before the Honourable Mr. Justice Mowat on the 19th, 20th, 21st, 29th and 30th days of November, 1923, who, after hearing all parties including the Attorney General for Canada and the Attorney General for Ontario reserved judgment and, on account of his differing from the opinion of the Honourable Mr. Justice Orde, on the 15th day of December, 1923, referred the action to a Divisional Court of the Appellate Division of the Supreme Court of Ontario in pursuance of section 32 of the Judicature Act, R.S.O. chapter 56, subsections 3 and 4.

13. The judgment of Mr. Justice Ferguson, agreed to by the majority of the Court of Appeal was that the Industrial Disputes Act fell within the exclusive jurisdiction given to the Dominion Parliament under (a) Class 2 of section 91—the regulation of trade and commerce, and (b) Class 27 of section 91—the Criminal Law except the constitution of Courts of Criminal Jurisdiction. As to the Act in question falling within Class 2 of section 91 Mr. Justice Ferguson held:—

that the “employers” named in subsection (c) of section 2 of the Industrial Disputes Act are dealers and vendors in articles of trade and commerce as well as producers thereof, and that the legislation here in question may be read as being legislation to prevent the shutting down and the stopping of plants and industries which vend and deal in articles of trade and commerce, which by reason of their very nature are of national importance.

As to the Act in question falling within Class 27 of section 91, Mr. Justice Ferguson held that:—

the power to make law in relation to the criminal law in its widest sense, includes power to make laws a paramount purpose of which is the prevention of public wrongs and crime, and the maintenance of public safety, peace and order, and that the power of defining what shall constitute a crime, and providing for punishment is only a part of the power conferred on the Dominion Parliament, by Class 27, section 91, of the British North America Act.

Mr. Justice Hodgins (dissenting) was of opinion:—

(1) That the Industrial Disputes Act when examined is not based on the existence or apprehension of a state of emergency.

(2) That the Act trenches on the provincial powers to legislate in regard to “Property and civil rights” and “Municipal institutions.”

(3) That the Act cannot be sustained as an exercise of any of the enumerated powers of legislation conferred on the Canadian Parliament by section 91 of the British North America Act.

(4) That the power of the Dominion to legislate under the provisions as to peace, order and good government is to be confined to such matters of Canadian interest and importance as can be dealt with without trenching upon any of the subjects expressly reserved for the provinces.

14. The appellants respectfully submit that the Industrial Disputes Act is *ultra vires* of the Parliament of Canada as interfering with property and civil rights (British North America Act, section 92 (13)) with municipal institutions (*ib.* section 92 (8)) and with a local undertaking (*ib.* section 92 (10)), but that in any event the Act, even if lawfully enacted, has no application to the appellants.

15. The appellants therefore submit that this appeal ought to be allowed for the following among other

#### REASONS

1. Because the Industrial Disputes Act interferes with the property and civil rights of the appellants and of their employees.
2. Because the appellants are a municipal institution in the province of Ontario within the meaning of section 92 (8) of the British North America Act and are therefore subject to the exclusive legislative authority of the legislature of that province.
3. Because the undertaking conducted by the appellants is a local work or undertaking within the meaning of section 92 (10) of the British North America Act and is therefore subject to the exclusive legislative authority of the said province.
4. Because neither section 91 (2) nor any other provision of the British North America Act authorized the Parliament of Canada to enact the Industrial Disputes Act.
5. Because the Industrial Disputes Act even if lawfully enacted has no application to the appellants.
6. Because the reasons given by Mr. Justice Orde and by Mr. Justice Hodgins in his dissenting judgment in the Appellate Division are right.

GEO. H. KILMER,  
GEOFFREY LAWRENCE,  
JOHN R. ROBINSON.



# VI.—CASE FOR THE ATTORNEY-GENERAL FOR ONTARIO BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

IN THE PRIVY COUNCIL.

No. 99 of 1924

*On Appeal from the Appellate Division of the Supreme Court of Ontario.*

BETWEEN TORONTO ELECTRIC COMMISSIONERS, (*Plaintiffs*) Appellants, AND COLIN G. SNIDER, J. G. O'DONOGHUE AND F. H. MCGUIGAN, (*Defendants*) Respondents, AND THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO, *Intervenants*.

## CASE FOR THE INTERVENANT, THE ATTORNEY GENERAL FOR ONTARIO.

1. The Attorney General for Ontario adopts paragraphs 1, 2 and 3 of the appellants' case; and further with reference to paragraph 3 thereof, states that the Municipal Electric Light, Heat and Power Works managed by the appellants are owned by and vested in the city of Toronto; and the appellants in managing the said work do so on behalf of, and in effect as agents for the city of Toronto, which is a municipal corporation.

2. The Attorney General for Ontario further adopts paragraphs 4 to 9 inclusive of the appellants' case.

3. The Honourable Mr. Justice Orde based his decision upon the following reasons:—

(A) That the impugned legislation purports to interfere with the civil rights of employers and employees and also with municipal institutions in the province.

(B) That encroachments upon enumerated subheads of section 92 of the British North America Act cannot be justified when the Dominion Parliament is legislating under the residuary power to make laws for the peace, order and good government of Canada.

(C) That the penal sections of the Industrial Disputes Investigation Act, 1907, cannot, since the *Board of Commerce case* (1922), 1 A.C., p. 191, be relied upon to buttress legislation which but for such alleged ancillary legislation, would be unquestionably invalid, and such an attempt to interfere with clearly defined provincial rights is not permissible.

(D) That the Act in question was not passed to meet a national emergency in the sense in which that term is used in the *Fort Frances case* (1923), A.C., p. 695.

(E) That whether or not the case was a proper one for a declaratory judgment there was also an application for an injunction to which the question of the constitutionality of the Act in question was, if raised, properly incidental.

4. The Attorney General for Ontario further adopts paragraphs 11 and 12 of the appellants' case; and in addition thereto states that at the trial evidence was given which purported to show the existence of a national emergency in

July and August of 1923, when the respondents were constituted as a board under the Act in question, such evidence being tendered to show a state of affairs which should justify the prior enactment of the impugned legislation in 1907—sixteen years before.

5. The Honourable Mr. Justice Mowat, although unable to disregard the decision of the Honourable Mr. Justice Orde without the latter's concurrence, indicated that in his view the question of strikes and their prevention was one of national concern, and that the legislation in question was justifiable by an extension of the principle established in the *Fort Frances* case.

6. The Chief Justice of Ontario agreed with Ferguson, J.A., that the impugned legislation was competent to the Dominion Parliament to enact as being a law for the peace, order and good government of Canada in relation to the regulation of trade and commerce.

7. The judgment of Ferguson, J.A., agreed to *in toto* by Smith and Magee, J.J.A., was based upon the following grounds:—

(A) That the legislation in question rather than being law in relation to subheads 8 (Municipal Institutions), 10 (Local Works), 13 (Property and Civil Rights), or 16 (Matters purely local) of section 92 of the British North America Act, was in "pith and substance" a provision for investigating industrial disputes which might develop so as to affect the national welfare, peace, order and safety of Canada as a whole.

(B) That except in conditions involving the very safety of the Dominion as a political entity the Parliament of Canada may not trench upon any of the subject matters enumerated in section 92 unless in pith and substance it is a law in relation to a class enumerated in section 91 of the British North America Act.

(C) That the Act in question may be read as being legislation to prevent the shutting down of industries which deal in articles of trade and commerce of national importance; and it may therefore be regarded as essentially a regulation of trade and commerce within subhead 2 of section 91.

(D) That the penal provisions of the Act are to be regarded as a valid invocation of the power of the Canadian Parliament to legislate in relation to the criminal law in its widest sense, particularly with respect to the prevention of crimes, the protection of public safety, peace and order.

8. The Attorney General for Ontario adopts the synopsis of the dissenting judgment of Hodgins J.A. contained in the latter part of paragraph 13 of the appellants' case.

9. The Attorney General for Ontario respectfully submits that the Industrial Disputes Investigation Act, 1907, is *ultra vires* the Parliament of Canada as

(A) Not being legislation upon a subject matter in relation to which the Parliament of Canada can competently make laws under either the enumerated subheads or the residuary power conferred upon it by section 91, and as

(B) Interfering with classes of subjects upon which the provinces alone may legislate, notably property and civil rights (section 92 (13) ) with municipal institutions (section 92 (8) ) and with a local work or undertaking (section 92 (10) ).

10. The Attorney General for Ontario therefore submits that this appeal ought to be allowed for the following among other



## REASONS.

1. Because the question of the constitutional validity of the Industrial Disputes Investigation Act, 1907, even if it could not be made the subject of a declaratory judgment in this case, has been properly raised and is determinable in connection with the application for an injunction.
2. Because the impugned legislation interferes with the property and civil rights of the appellants and of their employees.
3. Because the appellants as a municipal institution in the province of Ontario are subject to the exclusive legislative authority of the legislature of that province by virtue of subhead 8 of section 92 of the British North America Act.
4. Because the appellants conduct a local work and undertaking which is subject to the exclusive legislative authority of the Ontario Legislature by virtue of subhead 10 of section 92 of the British North America Act.
5. Because the Industrial Disputes Investigation Act, 1907, cannot be regarded in pith and substance as legislation upon the subject-matters of regulation of trade and commerce (section 91 (2) ) or of the criminal law (section 91 (27) ), nor of any other enumerated subhead of section 91.
6. Because the Act in question cannot be deemed to have been validly enacted under the residuary power to make laws for the peace, order and good government of Canada, on the ground that it enables the Dominion Government to cope with a situation of national importance, as it does not appear that such a situation existed when the Act itself was enacted in 1907, and the Parliament of Canada has no power so to legislate in anticipation of such a situation and in so doing to interfere with matters committed exclusively to the provinces.
7. Because the impugned legislation even if lawfully enacted cannot apply to the appellants.
8. Because the reasons given by Mr. Justice Orde in granting the injunction and by Hodgins J.A., in his dissenting judgment in the Appellate Division are right.

E. BAYLY.

GEOFFREY LAWRENCE.

## VII.—CASE FOR THE RESPONDENTS BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

### IN THE PRIVY COUNCIL

No. 99 of 1924.

*On Appeal from the Appellate Division of the Supreme Court of Ontario.*

BETWEEN TORONTO ELECTRIC COMMISSIONERS, (*Plaintiffs*) *Appellants*, AND COLIN G. SNIDER, J. G. O'DONOGHUE AND F. H. MCGUIGAN, (*Defendants*) *Respondents*, AND THE ATTORNEY-GENERAL OF CANADA AND THE ATTORNEY-GENERAL OF ONTARIO, *Intervenants*.

### CASE OF THE RESPONDENTS.

1. This is an Appeal from the Judgment of the Appellate Division of the Supreme Court of Ontario dated the 22nd of April, 1924, (Sir William Mulock, C.J.O., Magee, Ferguson, and Smith, J.J.A.; Hodgins, J.A. dissenting), which dismissed the action, in which the appellants were the plaintiffs, and also allowed an appeal by the respondents, the defendants in the action, from an interlocutory order of Mr. Justice Orde, granting an interim injunction, dated the 29th of August, 1923. The Appeal is brought pursuant to special leave granted on the 25th of July, 1924.

2. The question in the case is whether a statute of the Parliament of Canada, 6 and 7 Edward VII, chapter 20, passed on the 22nd of March, 1907, and cited as "The Industrial Disputes Investigation Act, 1907" (which has ever since been in operation throughout Canada and constantly acted on, and was subject to certain amendments in 1910 (9 and 10 Edward VII, chapter 29), 1918 (8 and 9 George V, chapter 27) and 1920 (10 and 11 George V, chapter 29) is or is not valid and within the jurisdiction of the Canadian Parliament under section 91 of the British North America Act, 1867, the said statute being one providing for the setting up of Boards of Conciliation and Investigation in cases of disputes between employers and employees in certain industries, namely, mines and agencies of transportation or communication or public utilities including (with certain exceptions not material to this case) railways, steamships, telegraphs, telephones, gas, electric light, water and power works; with certain ancillary provisions.

3. The statute provided for the establishment of Boards of Conciliation and Investigation on the application of either employer or employees. The application may be made when there is a "dispute" as therein defined "between an employer or ten or more persons" and his employees.

Application for a board in the defined industries is to be made to the Minister of Labour, accompanied by a statement of certain facts and a statutory declaration "That failing an adjustment of the dispute or a reference thereof by the minister to a board, to the best of the knowledge and belief of the declarant a lockout or strike will be declared, and . . . that the necessary authority to declare such lockout or strike has been obtained."

The minister, whose decision is final, shall within fifteen days after receipt of the application establish a board if satisfied that the Act applies. The board is to consist of three members appointed by the minister, two of whom may be recommended by the parties to the dispute.

The duty of the board is "to endeavour to bring about a settlement of the dispute," and to this end to "expeditiously and carefully inquire into the dispute, and all matters affecting the merits thereof," and to make all suggestions and do all such things as it deems right and proper for inducing the parties to come to a fair and amicable settlement of the dispute.



If a settlement is not arrived at, the board is to make a full report to the minister, with its recommendation for settlement, "according to the merits and substantial justice of the case." After the report has been made, provision is made for its free distribution, together with any minority report, to the parties and to newspapers, and otherwise in such manner as seems to the minister most desirable as a means of securing compliance with the board's recommendation. For the information of Parliament and the public the report and any minority report is to be published without delay in the monthly *Gazette*.

The report of the board has no binding effect unless the parties have expressly so agreed, and no court has power to recognize or enforce it, or to receive in evidence any report of, or any testimony or proceedings before, a board.

For the purpose of the inquiry the board is given the same powers of summoning and enforcing the attendance of witnesses and obtaining their evidence on oath and the production of books and documents as is vested in a Court of record for civil cases; and is authorized to enter and inspect the buildings where the industry is carried on, and interrogate persons therein. These powers are sanctioned by the imposition of a penalty not exceeding \$100.

The Act further provides that in the event of a "dispute" as therein defined it shall be unlawful for the employer to declare or cause "a lockout" or for any employee "to go on strike" on account of such dispute prior to or during a reference thereof to a Board of Conciliation and Investigation under the Act.

It is further provided that employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours; and in the event of such intended change resulting in a "dispute," the conditions of employment with respect to wages or hours and the relationship between the parties is to remain unchanged until the dispute has been dealt with by a board, but the Act is not to be used by either party "for the purpose of unjustly maintaining a given condition of affairs through delay."

Penalties enforceable under Part XV of the Criminal Code are imposed for causing a lockout or creating a strike contrary to the Act.

All expenses of or connected with the board are paid by the Government of Canada.

By the amending Acts of 1918 and 1920 the following sections were added:—

"63A. Where in any industry a strike or lockout has occurred or seems to the minister to be imminent and in the public interest or for any other reason it seems to the minister expedient, the minister, on the application of any municipality interested, or of the mayor, reeve, or other head officer, or acting head officer thereof, or of his own motion, may, without application of either of the parties to the dispute, strike, or lockout, whether it involves one or more employers or employees in the employ of one or more employers, constitute a Board of Conciliation and Investigation under this Act in respect of any dispute or strike or lockout, or may in any such case, if it seems to him expedient, either with or without an application from any interested party, recommend to the Governor in Council the appointment of some person or persons as commissioner or commissioners under the provisions of the Inquiries Act to inquire into the dispute, strike or lockout, or into any matters or circumstances connected therewith.

"63B. The minister, when he deems it expedient, may, either upon or without any application in that behalf, make or cause to be made any inquiries he thinks fit regarding industrial matters and may cause such steps to be taken by his department and the officers thereof as seem calculated to secure industrial peace and to promote conditions favourable to settlement of disputes."

4. The appellants are a Board of Commissioners appointed and acting under an Act of the legislature of the province of Ontario (1 George V. chapter 119) entitled an *Act respecting the city of Toronto* and passed in the year 1911 and as such they manage the Municipal Electric Light, Heat and Power Works of the city of Toronto and employ a large number of men.

5. On the 22nd of June, 1923, an application was made in pursuance of the said statute of 1907 to the Department of Labour at Ottawa on behalf of certain employees of the appellants for the appointment of a Board of Conciliation and Investigation in respect of a dispute between the said employees and the appellants. It was stated in the application that the employees affected were of various grades, being members of the Toronto Branch of the Canadian Electrical Trades Union; that the approximate number of employees affected or likely to be affected directly and indirectly was 737; and that the authority for the application was a unanimous vote of a majority of members of the Trades Union affected taken by ballot at a meeting specially called for the purpose, and also a written authorisation of 70 per cent of the members affected. It was also stated by the representatives of the employees in a statutory declaration that to the best of their knowledge and belief a strike would be declared failing an adjustment of the dispute or a reference thereof by the Minister of Labour to a Board of Conciliation and Investigation under the statute of 1907 and that the necessary authority to declare such a strike had been obtained.

6. After receipt of the said application correspondence passed between the Ministry of Labour and the parties concerned with a view to bringing the parties together without recourse to the statute of 1907, the minister being reluctant to appoint a board where the employer was a body closely associated (as in this case) with a municipality. As, however, there was apprehension with respect to a serious labour situation existing in other parts of Canada and the appellants would not agree to the appointment of a board, the minister in pursuance of the statute established a board by Order dated the 24th of July, 1923. The Respondent, J. G. O'Donoghue, K.C., was appointed on the nomination of the employees; in the absence of any nomination by the appellants, the Respondent, F. H. McGuigan, was appointed for them; and on the recommendation of the above two respondents, the Respondent, His Honour Judge Colin G. Snider, was on the 1st of August, 1923, appointed the third member, and was the chairman of the board.

7. On the 20th of August, 1923, the board by its chairman gave notice of a meeting to hear the parties on the 24th of August, 1923, with a request that all persons desiring to be heard should attend.

8. The appellants did not dispute that the proceedings were regular, and that if the statute was valid the order appointing the board was good.

9. The action out of which this appeal arises was thereupon commenced by the appellants by a writ dated the 21st of August, 1923, claiming (1) a declaration that the respondents were without lawful authority acting as a Board of Conciliation and Investigation under the Industrial Disputes Investigation Act, 1907, and amendments thereto, in respect of an alleged dispute between the appellants and certain of their employees, and (2) an injunction. On the same date the appellants gave notice of motion for an injunction, and on the 23rd of August, 1923, they gave notice to the Attorney-General of Canada that the action had been brought and the notice of motion had been given on the ground that the said statute was not applicable to a dispute between a municipal public utility commission and its employees, and also on the ground that the said statute was *ultra vires* the Parliament of Canada, the subject matter thereof being within the exclusive jurisdiction of the provinces under the British North America Act.

10. The motion was heard on the 23rd and 27th of August, 1923, before Mr. Justice Orde, who on the 29th of August, 1923, granted an interim injunction restraining the respondents from interfering with the appellants' business or entering upon their premises or examining their works or employees on their premises, and from exercising any of the powers contained in sections 30 to 38 of the said statute, or any of the compulsory powers conferred by it, and from interfering with the property and civil rights or the municipal rights of the appellants.



11. In his judgment Mr. Justice Orde referred to the powers given by the statute to the board to summon witnesses, including the parties to the dispute, to compel the production of books, papers and other documents, and to enter buildings and other premises for purposes of inspection, and to interrogate persons therein, which powers were sanctioned by penalties, and to the provisions of section 56 to 59 of the statute designed to preserve the *status quo* until the board had made its report and expressed the view that the statute purported "to interfere in the most direct and positive manner with the civil rights of employers and employees and also with the municipal institutions of this province, both subject matters of legislation exclusively assigned to the provinces by numbers 8 and 13 of the subjects enumerated in section 92" (of the British North America Act). He stated that "assuming that the main purpose or object of the Act falls within the residuary powers of Parliament under section 91, the judgment of the Judicial Committee in *City of Montreal v. Montreal Street Railway Co.* (1912) A.C. 333 has made it clear that the provision at the end of section 91, which limits the provincial powers even in matters exclusively assigned to the provinces, applies only to the 29 enumerated classes of subjects assigned by section 91 to the Parliament of Canada" and "that to those matters which are not specified amongst the enumerated subjects of legislation in section 91 the exception at its end has no application and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislatures by section 92." He then cited the words of Duff, J., in the *Board of Commerce Case* (1920) 60 S.C.R., 456 at p. 508, in which this proposition is made to depend upon whether the Dominion statute is "of such a character that from a provincial point of view it should be considered legislation dealing with property and civil rights" (in the provinces), but he did not decide whether the statute of 1907 is legislation "in relation to" such property and civil rights. He rejected any suggestion that the provisions imposing penalties might be justified under the Dominion power to pass criminal laws, relying for this conclusion upon the decision in "*In re the Board of Commerce Act, 1919*" (1922) 1 A.C. 191.

12. The respondents on the 13th September, 1923, gave notice of appeal to a Divisional Court from this interlocutory order of the learned judge, but, before the appeal was heard, pleadings in the action were delivered.

13. The appellants by their statement of claim alleged that the said statute of 1907 was not within the powers conferred upon the Parliament of Canada by section 91 of the British North America Act, and "dealt with" property and civil rights, one of the classes of subjects exclusively assigned to provincial legislatures by section 92 of the said Act; that the appellants were carrying on the work of a public utility for the municipality of Toronto and that in so far as it was sought to apply the statute of 1907 to a municipality and its employees it was "an interference with" Municipal Institutions, also one of the classes of subjects exclusively assigned to provincial legislatures by the said section 92, and that the Dominion Parliament had no jurisdiction to "interfere" by legislation or otherwise with a local undertaking, its management or administration whether carried on by the province or by a municipal corporation by virtue of powers delegated to it by the province.

14. The respondents delivered their defence on the 1st of October, 1923, and the case was tried on documentary and oral evidence before the Honourable Mr. Justice Mowat on the 19th, 20th, 21st, 29th and 30th of November, 1923. On the 15th of December, 1923, the learned judge gave judgment (*see* paragraph 16 below), expressing a view opposed to Mr. Justice Orde, and, on the ground that on the application for an interim injunction a judge had decided that the Industrial Disputes Investigation Act was *ultra vires* the Dominion Parliament and the said decision was deemed to be wrong and was of sufficient importance to be considered in a higher court, ordering that the action be referred to a

Divisional Court, under section 32 of the Ontario Judicature Act; and the action accordingly came for hearing before the Appellate Division of the Supreme Court of Ontario and was heard by five judges, viz., Sir Wm. Mulock, C.J.O., Magee, Hodgins, Ferguson, and Smith, J.J.A., on the 29th, 30th and 31st of January and the 1st of February, 1924, and at the same time there was heard the appeal of the respondents from the interlocutory order of the Honourable Mr. Justice Orde, and by an order of the 22nd of April, 1924, whereon judgment was signed on the 21st of May, 1924, it was ordered that the action be dismissed and that the respondents appeal be allowed.

15. At the trial evidence was given establishing:—

(a) That in 1867, when the British North America Act was passed, industrial disputes in the sense in which they are known to-day did not arise in Canada, that Canada was then mainly an agricultural community consisting of scattered provinces more or less frozen up in winter and in some cases without railway connection on Canadian soil, that trade in Canada was small and that in 1871 there were only some 180,000 employees in 40,000 industrial establishments or an average of  $4\frac{1}{2}$  employees in each establishment.

(b) That since 1867 Canada has become a highly industrialised community with an annual manufactured output of many millions of dollars, that about one-seventh in value of this output is manufactured in Toronto, that, by reason of the specialisation of industry, the goods produced in Montreal and Toronto are linked up with goods produced elsewhere in Canada, the finished product of one industry becoming the raw material of another, and that, when the process of production is stopped at any point, the results are widespread upon other industries.

(c) That local associations of employees have been replaced by national and in some cases international unions comprising in many cases many thousands of persons, that manufacturers are organised on a national basis, and that class feeling among the employees is a fact of serious importance making possible sympathetic strikes, as was shown by the case of the great Winnipeg general strike of 1919 which extended to other cities and provinces and assumed the form of a political as well as an economic threat to the State.

(d) That industrial disputes, at least in certain cases and in certain industries, are matters of national and not merely provincial concern, as was shown by the situation shortly before the passing of the statute of 1907.

(e) That at the time when the board was appointed the labour situation in other parts of Canada was tense, and had become so serious that all the available permanent militia from as far west as Winnipeg were moved to Nova Scotia, a movement which was followed by protests from other parts of Canada and a strike of coal miners in Alberta, three thousand miles from Nova Scotia, the scene of the original trouble.

(f) That at the time of the passing of the British North America Act strikes were illegal in Canada as being conspiracies in restraint of trade.

(g) That the probable result of a strike in a key industry, such as the monopoly distribution of electricity in Toronto, would be to deprive all manufacturing establishments in the district of electric power, with serious results upon the home and foreign trade of the whole of Canada.

16. In his judgment Mowat, J., pointed out that "the question of industrial strife, together with its ramifications and the growth of labour unions, is vastly different from the condition existing at the time of the passing of the British North America Act in 1867, and the silence of the Act regarding 'labour' and the absence of the specific allocation of that subject to the Dominion or the provinces is thus accounted for." He further referred to the fact that "the



question of labour had for more than twenty years been appropriated by the Dominion Parliament and Government. There is a Department of Labour with a Minister of Labour in charge, periodical publications dealing with labour questions, the labour market, the current cost of living, and the employment of the military forces of Canada in the protection of property and the public safety where violent eruptions have occurred or may. This department has, by common consent of the provinces during this long period, been the principal administrative means of dealing with the question of eruptive industrial strife." While recognizing that this does not settle the constitutional point of law, he expressed the view that a declaration of the court that all such administrative actions are to cease and, inferentially, that all the Governments and their law officers have erred or slept, should not be arrived at unless the law is clear.

17. The situation in Canada the learned judge found to be as follows:—

"It is important that a close touch should be kept of the movements and variations of industrial strife and that this can best be done, as such strife existed in 1907, and until the present time, by Federal Government.

"A general strike in Winnipeg in 1919 was only brought to an end through the voluntary efforts of the non-industrial citizens to break it, and to prevent the misery and under-feeding of children which seemed likely to ensue. All important labour unions in Canada were sympathetically affected by it from ocean to ocean, and if it had spread, as at one time feared, ruinous conditions would have ensued to trade and stable industry. In such a case, provincial lines are obliterated and the provinces, not having the means of free and instant communication with each other or for concert, could ill avert Dominion-wide trouble.

"The simple local strikes which alone could have been in contemplation of the fathers in 1864 and 1867 have given place to those of brotherhoods, composed in some instances of hundreds of thousands and Dominion-wide in their operations and probably beyond the resources of each province to deal with."

He came, therefore, to the conclusion that labour legislation such as the statute of 1907 was of national concern, and accordingly within the jurisdiction of the Dominion, even though such legislation may "invade the field of" property and civil rights in the provinces.

18. In the Appellate Division Sir William Mulock, C.J.O., Smith, J.A., and Magee, J.A., concurred in the reasons given by Ferguson, J.A. The learned judge, after stating that it was not necessary to consider the constitutional validity of the sections of the statute of 1907 which do not deal with the powers of the board (i.e., sections 56 to 61), expressed the opinion that the statute was not a law "in relation to 'municipal institutions' (8), 'local works' (10), 'property and civil rights' (13), 'or matters purely local' (16), as these words are used in subsections (8), (10), (13), and (16) of section 92 of the British North America Act, but is legislation to authorize and provide machinery for conducting an inquiry and investigation into industrial disputes between certain classes of employers and their employees, which disputes in some cases may, and in other cases will, develop into disputes affecting not merely the immediate parties thereto, but the national welfare, peace, order and safety, and the national trade and business. The purpose of the inquiry authorized by the Act is, I think, threefold: (1) the regulation of trade and business by preventing interruption of trade and commerce necessarily incident to delaying, hindering, interrupting, or stopping the operation of mines or public utilities; (2) the promotion and protection of national public peace, order and safety by (a) confining the dispute to a limited district or bringing about a settlement; (b) by informing the public in reference to the cause and nature of the dispute; (3) by bringing to bear upon the parties intelligent public opinion, and through that agency preventing the breaking out and spreading of strikes or lockouts, and the disturbances, rioting and breaches of the peace and criminal law which,

it is common knowledge, frequently follow the stopping, by strike or lockout, of the operation of mines, agencies of transportation or communication and public service utilities."

19. The learned judge, while not definitely deciding the point, expressed the view that the weight of authority was in favour of the proposition that "except in conditions involving the very safety of the Dominion as a political entity, the Parliament of Canada may not in its legislation trench upon any of the subjects enumerated in section 92 unless such legislation according to its pith and substance is legislation in relation to a class of legislation enumerated in section 91 of the British North America Act," and to that extent he declined to accede to the contention which the respondents made, and will make, that the matters enumerated in section 91 and 92 do not cover the whole legislative field, but that there is a residuum (not limited to conditions involving the safety of the Dominion) of power in the hands of the Dominion to legislate upon matters of national importance even though such legislation may affect or incidentally deal with matters enumerated in section 92. He held, however, that the legislation now in question fell within certain of the classes enumerated in section 91, namely, (2) "the Regulation of Trade and Commerce" and (27) "The Criminal Law," and on that ground held that it was within the jurisdiction of the Dominion.

20. Hodgins, J.A., in his dissenting judgment, took the view that no valid distinction could be made between "industrial strife" and "civil rights," and he held, though with reluctance, considering himself bound by authority, that the statute could not be supported either on the ground that it was an emergency measure, necessary in the interest of the peace, order and good government of the Dominion, or on the ground that it dealt with a matter of general Canadian interest and importance, or on the ground that it dealt with any of the classes enumerated in section 91.

The respondents humbly submit that this appeal should be dismissed and that the judgment of the Appellate Division should be affirmed for the following among other:

#### REASONS

- (1) Because the statute of 1907 in its proper aspect is not a law in relation to any matter coming within any of the classes of subjects enumerated in section 92 of the British North America Act;
- (2) Because the said statute is a law for the peace, order and good government of Canada in relation to a matter not coming within any of the classes of subjects assigned exclusively to the legislatures of the provinces;
- (3) Because the main provisions of the said statute are not in relation to any matter coming within any of the classes of subjects enumerated in said section 92 and the ancillary provisions are reasonably necessary for the attainment of the object aimed at in the main provisions;
- (4) Because the said statute is a law in relation to a matter of national importance.
- (5) Because the said statute and its various provisions are legislation in relation to matters coming within the following classes of subjects enumerated in section 91 of the British North America Act, namely, (2) The Regulation of Trade and Commerce and/or (7) Militia Military and Naval Service and Defence and/or (27) the Criminal Law;
- (6) Because the said statute was within the jurisdiction of the Parliament of Canada;
- (7) Because the said judgment was right.

JOHN SIMON.

LEWIS DUNCAN.



# VIII.—CASE FOR THE ATTORNEY-GENERAL OF CANADA BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

## IN THE PRIVY COUNCIL

No. 99 of 1924

*On appeal from the Appellate Division of the Supreme Court of Ontario*

BETWEEN TORONTO ELECTRIC COMMISSIONERS, (*Plaintiffs*) *Appellants*, AND COLIN COLIN G. SNIDER, J. G. O'DONOGHUE AND F. H. MCGUIGAN (*Defendants*) *Respondents*, and THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO, *Intervenants*.

## CASE FOR THE ATTORNEY GENERAL OF CANADA, INTERVENANT

1. This is an appeal by Special Leave from a judgment of the Appellate Division of the Supreme Court of Ontario, dated 22nd April, 1924, dismissing the action and also allowing an appeal by the respondents from an interim injunction order of Orde, J., dated 29th August, 1923.

2. In 1907 the Parliament of Canada passed "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities." This Act was amended in 1910, 1918, and 1920, and is cited as "The Industrial Disputes Investigation Act, 1907."

3. The Act applies to mines and agencies of transportation or communication or public utilities including (except as mentioned) railways, steamships, telegraphs, telephones, gas, electric light, water and power works. Provision is made for the application of the Act to disputes in other industries by consent.

The Act provides that in the event of "a dispute" as therein defined between "an employer of ten or more persons" and his employees it shall be unlawful for the employer to declare or cause "a lockout" or for any employee "to go on strike" on account of such dispute "prior to or during a reference thereof to a Board of Conciliation and Investigation" under the Act. No dispute can be the subject of a reference when fewer than ten employees are affected.

Application for such a board can be made to the Minister of Labour accompanied by a statement of certain facts and a statutory declaration "that failing an adjustment of the dispute or a reference thereof by the Minister to a board, . . . to the best of the knowledge and belief of the declarant a lockout or strike . . . will be declared and that the necessary authority to declare such lockout or strike has been obtained." The Minister, whose decision is final, shall within fifteen days after receipt of the application establish a board if satisfied that the Act applies. The board is to consist of three members, two of whom may be recommended by the parties to the dispute.

Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours.

Pending proceedings before the board the conditions of employment with respect to wages or hours and the relationship between the parties are to remain unchanged, but the Act is not to be used by either party to prolong the "*status quo*" "through delay."

Penalties enforceable under Part XV of the Criminal Code relating to summary convictions are imposed for causing a lockout or creating a strike contrary to the Act.

A strike is defined as "the cessation of work by a body of employees acting in combination," or "a concerted refusal" to continue to work, done as a means of compelling employers "to accept terms of employment."

The duty of a board is to "endeavour to bring about a settlement of the dispute, and to this end to expeditiously and carefully inquire into the dispute and all matters affecting the merits thereof," and to "make all suggestions and do all such things as it deems right and proper for inducing the parties to come to a fair and amicable settlement of the dispute."

If a settlement is not arrived at, the board is to make a full report to the minister, with its recommendation for settlement "according to the merits and substantial justice of the case." For the purpose of its inquiry the board is given the same powers of summoning and enforcing the attendance of witnesses and obtaining their evidence on oath and the production of books and documents as is vested in a court of record for civil cases; and is authorized to enter and inspect the buildings where the industry is carried on and interrogate persons therein. These powers are sanctioned by the imposition of a penalty not exceeding \$100.

After the report has been made, provision is made for its free distribution to the parties and to newspapers and otherwise as the minister may consider desirable as a means of securing compliance with the board's recommendation. For the information of Parliament and the public the report is to be published without delay in the monthly *Gazette* and annual report of the department. The report of the board has no binding effect unless the parties have expressly so agreed, and no court has power to recognize or enforce it.

All expenses of, or connected with, the board are paid by the Government.

4. By section 91 of the British North America Act, 1867, it is provided that the Parliament of Canada may "make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

"2. The regulation of trade and commerce."

"7. Militia, military and naval service, and defence."

"27. The Criminal Law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

5. By section 92 of the last-mentioned Act "in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

"8. Municipal institutions in the province."

"13. Property and civil rights in the province."

"14. The administration of Justice in the province including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts."

"15. The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

"16. Generally all matters of a merely local or private nature in the province."



6. The said sections 91 and 92 are introduced under the general caption "Distribution of legislative powers"; section 91 is specially entitled "Powers of the Parliament," and section 92, "Exclusive powers of provincial legislatures."

7. In July, 1923, upon the application of officials of the Canadian Electrical Trades Union, Toronto Branch, representing certain of the appellants' employees, alleging a dispute as to wages and working conditions, the respondents were constituted a Board of Conciliation and Investigation, to which the dispute was referred under "The Industrial Disputes Investigation Act, 1907." The regularity of the proceedings and of the appointment is admitted on behalf of the appellants.

8. The appellants disputed the validity of the Act, and the authority of the board; and, upon the issue by the board of a notice of meeting to hear the parties and their statements, evidence and witnesses, the appellants brought this action, claiming (1) a declaration that the Respondents were acting without lawful authority as a board under the Act, and (2) an injunction restraining them from proceeding with the investigation of the alleged dispute.

9. The appellants moved for an interim injunction before Orde, J., and, by his direction, the Interveners were notified under section 33 of The Ontario Judicature Act that the constitutional validity of The Industrial Disputes Investigation Act, 1907, was brought in question. Pursuant to this notice, the Interveners appeared by counsel both at the trial and before the Appellate Division.

10. On 29th August, 1923, Orde, J., granted an interim injunction, being of opinion that certain of the provisions of "The Industrial Disputes Investigation Act, 1907" were beyond the powers of the Parliament of Canada.

He said that he had "come to this conclusion with reluctance," because "it seems to be generally recognized that The Industrial Disputes Investigation Act has been a beneficial one, and has facilitated the settlement of numerous disputes," and that he hoped "it will be found possible to pass legislation, either federal or provincial, or both, which will maintain the efficiency of the scheme of the Act."

11. At the trial of the action before Mowat, J., evidence was given showing that in 1907, when the Act in question was passed, the prevention of strikes had become a matter of national concern; that the organization of labour in Canada is Dominion wide, and that, owing to the relationship of the general executive to the local branches and to "sympathetic" strikes, it may and frequently does happen that an industrial dispute spreads far beyond the particular place or trade in which it originated; and that, when the board was appointed in this case, serious results extending to many parts of the Dominion were feared from a strike. It was also shown that the Act, though originally opposed by labour, now has its full support, and that its operation has been highly successful. In the sixteen years since the passage of the Act 597 applications had been made and 428 boards appointed. Every application had been accompanied by a sworn statement that the applicants believed that a strike or lockout would occur, yet all but 37 cases had been disposed of without any such result. Many of these cases have touched Dominion-wide interests.

12. Mowat, J., observed that for more than twenty years there had been a Dominion Department of Labour which "has by common consent of the provinces been the principal administrative means of dealing with the question of eruptive industrial strikes." He thought that the question of industrial strife was of national concern, and that the Act was within the legislative competence of the Dominion Parliament. Being of opinion, therefore, that the

judgment of Orde, J. was wrong, and of sufficient importance to be considered by a higher court, he referred the case, under section 32 of the Ontario Judicature Act, to an Appellate Division of the Supreme Court of Ontario.

13. Upon this reference by Mowat, J., the trial continued before an Appellate Division of the Supreme Court of Ontario (Mulock, C. J. O., and Magee, Hodgins, Ferguson and Smith, JJ. A.) and an appeal by the respondents from the interim injunction order of Orde, J., was heard at the same time. On 22nd April, 1924, the Appellate Division, by the judgment from which this appeal was brought, set aside the order of Orde, J., and dismissed the action.

14. Mulock, C. J. O., was of opinion that the Act was within the powers of the Parliament of Canada under class 2 of section 91 of the British North America Act, "The Regulation of Trade and Commerce."

Ferguson, J. A., said:—

"The legislation here in question may be read as being legislation to prevent the shutting down and the stopping of plants and industries which vend and deal in articles of trade and commerce, which, by reason of their very nature, are of national importance.

"It cannot be disputed that to deprive the city of Toronto of electric power on which it depends for light, heat and power is to disturb and hinder the national trade and commerce and to endanger public peace, order and safety."

He therefore considered that the Act fell under "the Regulation of Trade and Commerce." He also thought that it fell under class 27 "The Criminal Law," and that it did not fall under any of the Provincial powers enumerated in section 92. Magee and Smith, JJ. A., concurred.

Hodgins, J. A., said:—

"It cannot be denied, I think, that labour troubles spring up locally, affect at first local concerns, and can best be dealt with in a spirit of conciliation which in itself involves local action. But they are likely, if not so dealt with, to spread, and so spreading, might reasonably be said to affect the whole industrial fabric of the nation. They do not always do so, but the possibility can be clearly appreciated."

But he felt himself compelled by authority, though with great reluctance, to hold that the Act was beyond the powers of the Parliament of Canada.

15. This intervenant humbly submits that this appeal should be dismissed, and that the judgment of the Appellate Division should be affirmed for the reasons stated by Mowat, J., and Mulock, C. J. O., and Ferguson, J. A., and for the following, among other

#### REASONS

1. Because The Industrial Disputes Investigation Act, 1907, was competently enacted by the Parliament of Canada under class 27 of Section 91, "The Criminal Law";
2. Because the Act is a law in relation to the "Regulation of Trade and Commerce";
3. Because the Act is a law in relation to militia, military and naval service, and defence;
4. Because the Act is a law for the peace, order and good government of Canada in relation to a matter not coming within the classes of subjects by the British North America Act assigned exclusively to the legislatures of the provinces;
5. Because the Act is not legislation in relation to a matter of a merely local or private nature competent to the provincial legislatures under any of the classes of subjects enumerated in section 92;
6. Because the Act viewed in its proper aspect and for its proper purpose being incompetent to any provincial legislature is therefore competent to the Parliament of Canada;



7. Because according to its true nature and character and paramount purpose, the Act is a law for the peace, order and good government of Canada in relation to—
  - (a) The prevention and settlement of strikes and lockouts in industries the effective operation of which is of national concern;
  - (b) A matter which affects the body politic of Canada, and is unquestionably of Canadian interest and importance;
  - (c) A problem of statesmanship within the sole competence of the central Government;
8. Because if the Act trenches at all upon the provincial legislative power it does so only incidentally and no more than is necessary to give effect to the general legislative project which is competent to the Parliament of Canada.

E. L. NEWCOMBE.

CHRISTOPHER C. ROBINSON.

# IX.—ARGUMENT BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

## IN THE PRIVY COUNCIL

COUNCIL CHAMBER, WHITEHALL, S.W. 1,  
FRIDAY, November 14, 1924.

Present: Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Wrenbury and Lord Salvesen.

### ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

BETWEEN: TORONTO ELECTRIC COMMISSIONERS, APPELLANTS, and  
SNIDER AND OTHERS, RESPONDENTS, and THE ATTORNEY  
GENERAL OF CANADA and THE ATTORNEY GENERAL OF  
ONTARIO, INTERVENANTS.

(Transcript of the Shorthand Notes of Marten, Meredith & Co., 8 New Court, Carey Street, London, W.C.2, and Cherer & Co., 2 New Court, Carey Street, London, W.C.2.)

Counsel for the Appellants and the Intervenant, the Attorney General of Ontario: Mr. STUART BEVAN, K.C., Mr. GEOFFREY LAWRENCE and Mr. JOHN R. ROBINSON (of the Canadian Bar), instructed by Messrs. Blake & Redden.

Counsel for the Respondents: Sir JOHN SIMON, K.C., and Mr. LEWIS DUNCAN (of the Canadian Bar), instructed by Messrs. Charles Russell & Co.

Counsel for the Intervenant, The Attorney General of Canada: Mr. A. C. CLAUSON, K.C., and Mr. JAMES WYLIE, instructed by Messrs. Charles Russell & Co.

### FIRST DAY

Mr. STUART BEVAN: May it please your Lordship. I appear with my learned friends Mr. Geoffrey Lawrence and Mr. Robinson for the appellants, the plaintiffs in the action, the Toronto Electric Commissioners, and also for the Attorney General of Ontario. For the respondents, Snider, O'Donoghue and McGuigan, my learned friends, Sir John Simon and Mr. Lewis Duncan, appear, and for the Attorney General of Canada my learned friends Mr. Clauson and Mr. Wylie appear.

LORD DUNEDIN: Which side does the Attorney General of Ontario support?

Mr. STUART BEVAN: The Attorney General of Ontario supports the Toronto Electric Commissioners.

My Lords, the question which arises upon the appeal is whether a Dominion statute, which is entitled "The Industrial Disputes Investigation Act," of 1907, is within the powers of the Parliament of Canada, having regard to the provisions of sections 91 and 92 of the British North America Act, and it raises, as all these cases do, questions of very great public importance.

VISCOUNT HALDANE: Can you tell us in a sentence, was it a statute for the settlement of industrial disputes all over Canada?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: All disputes, or a limited class?



MR. STUART BEVAN: A limited class of industrial disputes. "Settlement" is not the word I should choose, if I may respectfully say so, when one looks at the provisions of the Act, because the Act provides for an investigation and the appointment of a Board of Commissioners, and for that Board to settle, if they can, by persuading the parties who come before it to settle their differences, or, failing settlement, limits the power of the Board to publishing a recommendation and a statement of the matters in dispute.

VISCOUNT HALDANE: There is a well known Canadian Industrial Disputes Act, and I want to know whether it is this one. If it is the Act of which we have heard, then there are some very remarkable powers conferred; for one thing, the parties are not allowed to go on with their dispute, and it is made a criminal offence, for which there is a punishment. Whether the Parliament of Canada can do that under section 91, which reserves criminal law to the Dominion, I do not know; there are very particular qualifications of that. Is this the general Industrial Disputes Act?

SIR JOHN SIMON: Yes, my Lord. It is the well known Lemieux Act. It has been the law now since 1907.

MR. STUART BEVAN: My Lords, the matter arises in this way. The appellants, the Toronto Electric Commissioners, are appointed under a statute to manage the municipal electric light, heating and power works of the city of Toronto, and, in the course of carrying out their duties, they necessarily employ a number of men.

VISCOUNT HALDANE: Can you tell us in a sentence what they do? Have they compulsory powers over the electricity of Toronto?

MR. STUART BEVAN: Yes, I will refer your Lordships to the Act. They act as the municipality; the municipality delegates the whole of its powers.

VISCOUNT HALDANE: What I want to know is this. Have they municipal control over the electricity of Toronto in the sense that they can put down transmission cables, developing centres, provide distribution apparatus and enter houses? Have they in fact the full control of the electricity organization of Toronto?

MR. STUART BEVAN: I have not the whole of the statute. The statute is printed in the Appendix, but the material sections only are set out. I am told, the Act can be referred to in its entirety if necessary, that they have all those powers which are indicated by your Lordship.

VISCOUNT HALDANE: That is to say, they can abrogate the civil rights in respect of electricity of the inhabitants of Toronto?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: I hope the statute is here. We always have to complain that the parties never see the points that will ultimately emerge, and, consequently, we are left without the statute.

MR. STUART BEVAN: So far as the statutes appear in the Appendix, there is nothing to indicate the contrary of what I assert, the position as indicated by your Lordship. Reference may be made to the statute, but the contrary has never been suggested in the Courts below.

VISCOUNT HALDANE: I hope the Acts are here. They may be in a book for anything I know, and it ought to be possible to have them for reference. We ought not to be left to the judgment of somebody in Canada who has put together what sections he thinks will be useful for our guidance. It is we who have to determine what it is necessary to refer to.

MR. STUART BEVAN: I will look into the matter, and the statutes shall be obtained. Perhaps it is sufficiently indicated by section 18 of the Revised Statutes of Ontario, 1914, Chapter 204, which is on page 36.

VISCOUNT HALDANE: That is the Electrical Act?

Mr. STUART BEVAN: Yes, it is at page 36 of the Appendix. It is entitled: "An Act respecting the construction and operation of Works for supplying Public Utilities by Municipal Corporations and Companies." Section 18, subsection (1), provides: "The corporation of every urban municipality may manufacture, procure, produce and supply for its own use and the use of the inhabitants of the municipality any public utility for any purpose for which the same may be used; and for such purposes may purchase, construct, improve, extend, maintain, and operate any works which may be deemed requisite, and may acquire any patent or other right for the manufacture or production of such public utility, and may also purchase, supply, sell or lease fittings, machines, apparatus, meters, or other things for any of such purposes."

VISCOUNT HALDANE: It is very convenient to have this, but I wish to say for general reference that, when cases turn on statutes like this, they need not be printed, because we do not want to raise the cost, but if parties would send over King's Printer's copies, so that they may be available, it would be much better. Fortunately we have this one here, but sometimes it is very embarrassing.

Mr. STUART BEVAN: I will endeavour to obtain a copy and see whether any of the other provisions throw any light upon the position.

What brings the parties to your Lordships is this. In June, 1923, two officers of the Canadian Electrical Trades Union, the Toronto Branch, applied for the appointment of a Board under the Industrial Disputes Act, alleging a dispute, I will refer your Lordships to the provisions of the Act in a moment, between the appellants and the branch of the Union with regard to wages and working conditions.

VISCOUNT HALDANE: Before you go to that, in 1923 two officers of a branch of the Union applied for the appointment of a Board?

Mr. STUART BEVAN: Yes, a branch of the Canadian Electrical Trades Union. The Minister of Labour notified the appellants, the Commissioners, of this application.

VISCOUNT HALDANE: The Dominion Minister of Labour?

Mr. STUART BEVAN: Yes, and asked the appellants to consent to the appointment of a Board. The appellants, taking the view that I am here to-day to submit to your Lordships, refused to give their consent or to proceed in the matter. In July, 1923, the Board was established by the Minister, and, on the recommendation of the workmen, he appointed the respondent, Mr. O'Donoghue, a member of the Board. I will tell your Lordships how the three Members came to be appointed. The appellants, consistently with their previous refusal to recognize the Board in any way, refused to recommend a member, and, in the absence of any recommendation, the Minister appointed Mr. McGuigan, and those two, being appointed themselves, appointed Judge Snider the third member and Chairman of the Board.

VISCOUNT HALDANE: I suppose you asked for an injunction against their acting?

Mr. STUART BEVAN: Yes, we attended the first meeting of the Board and objected to their jurisdiction. We then issued a Writ and claimed a declaration that the respondent Board, these three respondents, were acting without lawful authority. An injunction was granted restraining the Board from exercising the powers under the Act, and Mr. Justice Orde, who granted the injunction, delivered a considered judgment, in which he upheld the claims made by the appellants.

Sir JOHN SIMON: That was an interlocutory injunction.

Mr. STUART BEVAN: Yes, an injunction until the trial. In November, 1923,



the action came on for trial before Mr. Justice Mowat, and he, taking a view differing from that expressed by Mr. Justice Orde granting the injunction, referred the action to a Divisional Court under a section of the Judicature Act. The matter then came before the Court, and Mr. Justice Hodgins dissenting, the Court held that the Act fell within the exclusive jurisdiction given to the Dominion Parliament under section 91 of the British North America Act.

LORD DUNEDIN: That is to say, they upheld Mr. Justice Mowat?

MR. STUART BEVAN: Yes, Mr. Justice Hodgins dissenting.

VISCOUNT HALDANE: Was there an appeal to the Supreme Court?

MR. STUART BEVAN: No, my Lord, the appeal from that Court is to the Privy Council.

VISCOUNT HALDANE: It may be to the Privy Council.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: This raises an uneasy sense in my mind, which we may have to get rid of, and that is, that this puts the whole of the Lemieux Act into controversy.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: When was the Lemieux Act passed; it was a long time ago, was it not?

SIR JOHN SIMON: In 1907. Mr. Lemieux was Postmaster General.

LORD DUNEDIN: Has the Supreme Court ever given judgment on this Act in another case?

MR. STUART BEVAN: No, I think this is the first time that the position in regard to this Act has fallen to be determined.

VISCOUNT HALDANE: It is nearly inconceivable to me that in these hot trade disputes they should not have raised the constitutionality of the Lemieux Act.

MR. STUART BEVAN: What has happened is that the Act has been operated before, but it has always been done by consent. In this particular case, upon the application for a Board, the Minister of Labour approached the appellants, the Commissioners, and asked for their consent. That seems to have been the procedure that has always been followed, and consent in most cases has been given, but now the Commissioners and the Attorney General of Ontario desire to test the legal position, and to know what their rights are.

VISCOUNT HALDANE: Now you have told us very much the point in the case?

MR. STUART BEVAN: Yes, my Lord, but I am sorry to say the point in the case will involve a close examination of the Lemieux Act, and also the examination of a good many authorities.

LORD DUNEDIN: I think it comes out pretty clearly that the statute under which you have your municipal powers has very little to do with it; you might be any company.

MR. STUART BEVAN: But for this: Your Lordship remembers the provisions of section 92 of the British North America Act.

VISCOUNT HALDANE: It is an Ontario statute which incorporates you?

MR. STUART BEVAN: Yes, but the fact that we are a municipal authority is material in view of the provisions of section 92 of the British North America Act, which begins on page 1 of the Joint Appendix.

LORD DUNEDIN: Does that really make much difference, because there is a provision which says that, where the field is traversed by both, the Dominion gets the best of it.

MR. STUART BEVAN: Yes. My case here is that the field is not encroached upon in any way by the provisions of section 91, which set out the powers of the Dominion.

LORD DUNEDIN: That I quite understand. It is *a propos* of my question that it would be the same if it was anybody else. Your point is the defect in their title, and not the prevailing equities in your own?

MR. STUART BEVAN: I have to show it is within section 92, because, if it is not within section 92, it may well be contended that it comes within the power of the Dominion Parliament to make laws for the peace, order and good government of Canada.

VISCOUNT HALDANE: Let me ask you about the injunction. Was it an injunction to prevent you locking out your workmen?

MR. STUART BEVAN: No, it was an injunction to prevent the Board from proceeding to deal with the matter which has been submitted to them under the provisions of the statute.

LORD DUNEDIN: Stopping the arbitration, if you call it an arbitration?

MR. STUART BEVAN: Yes, and that would automatically enable me to conduct my business in the way I had conducted it before, and did not maintain the *status quo* which would have had to be maintained if the Board was properly constituted.

VISCOUNT HALDANE: If the Board was set up you were precluded from locking out your workmen?

MR. STUART BEVAN: Yes, it would have maintained the *status quo*, until the recommendation of the Board was published.

VISCOUNT HALDANE: Your civil right to lock out your workmen would have gone?

MR. STUART BEVAN: Yes, this statute not only deals with matters of strikes, but other matters. My submission is going to be that there is no overlapping here, and I rely upon the exclusive power of the provincial legislation granted in respect of head 8 "Municipal Institutions in the Province", 10 "Local Works and Undertakings other than such as are of the following Classes", we need not trouble with the exceptions, and, most important of all, 13.

VISCOUNT HALDANE: I suppose the Dominion could, under its exclusive control of criminal law, have made it a crime for a municipal institution to act in a certain way.

MR. STUART BEVAN: With regard to that, I should have to refer your Lordship to certain decisions of this Board, which show that a distinction has to be drawn between the class of case where dealing with the criminal law is the primary object of the legislature, and the other class of case where it is only incidental to some other object to be obtained by the legislation.

VISCOUNT HALDANE: We know those cases well. I am taking a case, where genuinely altering the criminal law, the Dominion said: In future the law is to be that such and such a thing is a crime.

MR. STUART BEVAN: I should not like to commit myself to answering that without knowing the precise nature of the legislation, but, speaking generally, if it were a plain straight-forward attempt (I am not using the expression "straight-forward" in any offensive sense) to extend the provisions of the criminal law, I should say that was a matter for the Dominion Parliament.

LORD DUNEDIN: There is a case in which I gave the judgment of the Board, a very long time ago, with regard to railway legislation.

MR. STUART BEVAN: I had that case in mind when I gave your Lordship that answer. It is the case of the *Grand Trunk Railway Company of Canada v. The Attorney General of Canada*, reported in 1907 Appeal Cases, at page 65.



LORD DUNEDIN: I think that comes to the simple question: Is this criminal legislation?

MR. STUART BEVAN: Yes. The head-note in that case is this: "Held, that the Dominion Parliament is competent to enact section 1 of Canadian statute 4 Edward 7th, Chapter 31, which prohibits 'contracting out' on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants. That section is *intra vires* the Dominion as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under the British North America Act, 1867, section 92, sub-section 13, are the subject of provincial legislation." What my Lord Dunedin says, in delivering the judgment of the Board, is this: "The true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation. It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation."

LORD DUNEDIN: This is the real point; I am going on the older cases. I say the older cases "seem to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." That is laying down what had been laid down by Lord Macnaghten and others before me. "Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation."

VISCOUNT HALDANE: I remember there was a case since that one, in which the question was whether a municipality could clean out ditches of a railway company, and it was held that they could not.

SIR JOHN SIMON: That is the case of the *Canadian Pacific Railway Company v. the Corporation of the Parish of Notre Dame de Bonsecours*, reported in 1899 Appeal Cases, at page 367.

MR. STUART BEVAN: The head-note is: "By the true construction of British North America Act, 1867, section 91, subsection 29, and section 92, subsection 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works." Lord Watson, delivering the judgment of the Board, says: "It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorised works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec."

VISCOUNT HALDANE: The municipality could interfere if the structure of the railway was not affected?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: There is a judgment of Lord Atkinson in a Montreal case.

MR. STUART BEVAN: That is in 1912 Appeal Cases.

Sir JOHN SIMON: It is the through traffic case.

Mr. STUART BEVAN: It is applying those principles on which I am going to contend I am entitled to succeed on this appeal.

In order that the necessary materials may be before your Lordships I shall have to read, in some detail, the Act itself, and I think the most convenient thing for me to do will be to read it at once, in order that your Lordships may appreciate what the position is. The whole of the Act is set out in the Appendix.

LORD ATKINSON: Will you call attention to any coercive power which they have?

Mr. STUART BEVAN: Yes, that is what I propose to do. The Lemieux Act of 1907, 6 & 7 Edward 7th, Chapter 20, is set out at page 11 of the Joint Appendix.

Sir JOHN SIMON: We have, if it is more convenient, some separate copies, though I think probably your Lordships will find it is quite convenient to have it in the book.

VISCOUNT HALDANE: I should like to have a separate copy.

Sir JOHN SIMON: Might I correct one misapprehension? My learned friend, Mr. Stuart Bevan, said, in answer to a question by Lord Dunedin, that ever since 1907 the Lemieux Act had always been worked by consent, and that, therefore, no question had ever been raised. That is not quite so; there is a case in the Canadian Reports, where it was decided by the Court of Appeal of Quebec, in the face of challenge, that the Act was good. I am not saying that it binds anybody except the Provincial Court, but, in fact, it has been challenged.

Mr. STUART BEVAN: I am sorry I have not found that decision.

Sir JOHN SIMON: It is in 44 Quebec Supreme Court Reports, at page 350. The case is the *Montreal Street Railway Company v. The Board of Conciliation and Investigation*; it was with reference to this Act.

Mr. STUART BEVAN: Probably the correct statement would be that it has never been applied to the case of a municipality, save by consent.

Sir JOHN SIMON: I do not know how that may be. I am only saying, if the impression was that nobody has ever litigated this in Canada, that is not so.

Mr. STUART BEVAN: In a municipality.

Sir JOHN SIMON: This happens to be the Montreal Street Railway.

Mr. STUART BEVAN: That is not necessarily a municipality.

Sir JOHN SIMON: No, but it is a provincial enterprise.

VISCOUNT HALDANE: Will you tell me what is the relation of the Act at page 4 to the Lemieux Act?

Mr. STUART BEVAN: It is an independent Act. There were no proceedings under this Act. I do not know why it has been included. I will refer to it. It seems to deal with railways chiefly. Then you come to trade disputes on page 5, section 3.

VISCOUNT HALDANE: There are powers.

Mr. STUART BEVAN: Yes, I had better deal with it as a matter of history, though it does not appear to me to be directly relevant to this matter.

VISCOUNT HALDANE: We cannot tell whether it is relevant or not. I should like to know what its relation to the Lemieux Act is.

Mr. STUART BEVAN: The Lemieux Act does not repeal it, and, so far as I know, there is no reference to the Act of 1906 in the Lemieux Act. I think that the earlier statute applies only to railways, except by the consent of employers and employees, when the provisions of the Act with regard to railway disputes may be invoked by the employers and workmen. Your Lordships will find that on page 4, section 2 (h), at the bottom of the page: "Conciliation



board' means any body constituted for the purpose of settling disputes between employers other than any railway employer and workmen by conciliation or arbitration, or any association or body authorized by an agreement in writing made between employers other than railway employers and workmen to deal with such disputes." I think, outside the relations of railways and railway employees, the Act has no application to where the parties by agreement refer an industrial dispute to a conciliation Board.

VISCOUNT HALDANE: Railways appear to be in a special position?

MR. STUART BEVAN: Yes. That is provided for by section 13, on page 7. "Whenever a difference exists between any railway employer and railway employees, and it appears to the Minister that the parties thereto are unable satisfactorily to adjust the same, and that by reason of such difference remaining unadjusted a railway lockout or strike has been or is likely to be caused, or the regular and safe transportation of mails, passengers or freight has been or may be interrupted, or the safety of any person employed on a railway train or car has been or is likely to be endangered, the Minister may, either on the application of any party to the difference, or on the application of the corporation of any municipality directly affected by the difference, or of his own motion, cause inquiry to be made into the same and the cause thereof, and, for that purpose, may, under his hand and seal of office, establish a committee of conciliation, mediation and investigation to be composed of three persons to be named, one by the railway employer, and one by the railway employees, parties to the difference, and the third by the two so named, or by the parties to the difference in case they can agree. (2) The Minister shall in writing notify each party to name a member of the committee stating in such notice a time, not being later than five days after the receipt of such notice, within which this is to be done. (3) If either party within such time or any extension thereof that the Minister, on cause shown, may grant, refuse or fails to name a member of the committee, the Minister or the lieutenant governor in council, as the case may be, as hereinafter provided, may appoint one in the place of the party so refusing or in default, and if the members of the committee so chosen fail to elect a third member, the Minister, or the lieutenant governor in council, as the case may be, may make such selection." Then section 14: "It shall be the duty of the committee to endeavour by conciliation and mediation to assist in bringing about an amicable settlement of the difference to the satisfaction of both parties, and to report its proceedings to the Minister." Then section 15: "In case the conciliation committee is unable to effect an amicable settlement by conciliation or mediation the Minister may refer the difference to arbitration." Then there are provisions for the appointment of a Board of Arbitration, and by section 23, on page 91, powers are given to the Board. "For the purpose of such inquiry, the board shall have all the power of summoning before it any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation, if they are persons entitled to affirm in civil matters, and produce such documents and things as the board deems requisite to the full investigation of the matters into which it is enquiring, and shall have the same powers to enforce the attendance of witnesses, and to compel them to give evidence as is vested in any court of record in civil cases; but no such witness shall be compelled to answer", and so forth. Then section 25 deals with books: "The summons shall be in such form as the Minister shall prescribe, and may require such person to produce before the board any books, papers, or other documents in his possession or under his control, in any way relating to the proceedings."

LORD ATKINSON: Section 23 gives them great powers.

MR. STUART BEVAN: Yes.

LORD ATKINSON: The powers of a Court of Justice?

Mr. STUART BEVAN: Yes, but, so far as I can see, there are no powers given in this Act to secure that the *status quo* remains unaltered during the hearing of the matter before the Conciliation Board, nor are there any penalties imposed upon the parties if they fail to attend or to give the assistance which the Board requires, but this, by its terms, relates, except in the case of consent, only to disputes between railway companies and their employees. The Lemieux Act of 1907 is of a very different character. It affects a very large number of persons, companies and corporations; it makes the reference to the Board of Conciliation compulsory; it does not call for the consent of either party, and the various sections I am going to refer to in a moment constitute, in my submission, a very great and serious interference with property and civil rights in the province. It is at page 11 of the appendix. It is entitled: "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities." The interpretation section is section 2: "'Minister' means the Minister of Labour." This shows the interpretation of the Act. "'Employer' means any person, company or corporation employing ten or more persons and owning or operating any mining property, agency of transportation or communication, or public service utility, including, except as hereinafter provided, railways, whether operated by steam, electricity or other motive power, steamships, telegraph and telephone lines, gas, electric light, water and power works; (d) 'employee' means any person employed by an employer to do any skilled or unskilled manual or clerical work for hire or reward in any industry to which this Act applies; (e) 'dispute' or 'industrial dispute' means any dispute or difference between an employer and one or more of his employees, as to matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such violation thereof as constitutes an indictable offence); and, without limiting the general nature of the above definition, includes all matters relating to: (1) the wages allowance or other remuneration of employees, or the price paid or to be paid in respect of employment; (2) the hours of employment, sex, age, qualification or status of employees, and the mode, terms and conditions of employment; (3) the employment of children or any person or persons or class of persons, or the dismissal of or refusal to employ any particular person or persons or class of persons; (4) claims on the part of an employer or any employee as to whether and, if so, under what circumstances, preference of employment should or should not be given to one class over another of persons being or not being members of labour or other organisations, British subjects or aliens; (5) materials supplied and alleged to be bad, unfit or unsuitable, or damage alleged to have been done to work; (6) any established custom or usage, either generally or in the particular district affected; (7) the interpretation of an agreement or a clause thereof." So that your Lordships see the widest field is given to disputes, and in the case of subsection (7), which is a rather remarkable case, the position is this, that, if there is a dispute between an employer, as defined by the Act, employing ten or more persons in a particular public service utility, and one or more of his employees, as to the meaning of a clause in the agreement of service, as to whether the employee may be dismissed at seven days' or fourteen days' notice, the whole matter may be referred to the Conciliation Board, if this statute is *intra vires* the Dominion Parliament, and the position is to be held up, the employer, in the case I have put, being compelled to continue to employ the man, although upon the plain construction of the agreement of employment he was entitled to dismiss him at a week's notice. That is only one instance of the invasion of civil rights. The other subsections from 1 to 6 as well, in my submission, constitute a similar interference with property and civil rights. Then there are definitions of lockout and strike. I do not think I need trouble



your Lordships with that. Then there is: "Constitution of Boards." Section 5: "Wherever any dispute exists between an employer and any of his employees"—that will be a dispute under (e) on page 12—"and the parties thereto are unable to adjust it, either of the parties to the dispute may make application to the Minister for the appointment of a Board of Conciliation and Investigation, to which Board the dispute may be referred under the provisions of this Act." Then there is a proviso with regard to railway companies, which is not material. Then section 7: "Every Board shall consist of three members who shall be appointed by the Minister." Section 8 deals with the appointment of the Members of the Board, the procedure there laid down being followed, or endeavoured to be followed, in the present case, as I have told your Lordships. Then, by section 9, as soon as the Board has been appointed, the Registrar shall notify both the parties. Sections 15 to 20 are sections dealing with the procedure for the reference of disputes. Then section 16 is important, because it shows that the operation of the Act is not confined to cases of disputes between masters and men, where the men are members of trade unions. "The application and the declaration accompanying it"—that is the application for the appointment of a Board—" (1) if made by an employer, an incorporated company or corporation, shall be signed by some one of its duly authorized managers or other principal executive officers; (2) if made by an employer other than an incorporated company or corporation, shall be signed by the employer himself in case he is an individual, or a majority of the partners or members in case of a partnership firm or association; (3) if made by employees members of a trade union, shall be signed by two of its officers duly authorized by a majority vote of the members of the union, or by a vote taken by ballot of the members of the union present at a meeting called on not less than three days' notice for the purpose of discussing the question; (4) if made by employees some or all of whom are not members of a trade union, shall be signed by two of their number duly authorized by a majority vote taken by ballot of the employees present at a meeting called on not less than three days' notice for the purpose of discussing the question." I ought to have asked your Lordships to look at section 6, on page 13, which shows that when an application is made for the appointment of a Board of Conciliation, the Minister, if satisfied that the provisions of the Act apply, must appoint a Board. "Whenever, under this Act, an application is made in due form for the appointment of a Board of Conciliation and Investigation, and such application does not relate to a dispute which is the subject of a reference under the provisions concerning railway disputes in the Conciliation and Labour Act, the Minister, whose decision for such purpose shall be final, shall, within fifteen days from the date at which the application is received, establish such Board under his hand and seal of office, if satisfied that the provisions of this Act apply." Section 20, subsection (3), shows, as subsections (3) and (4) of section 16 show, that the operation of the Act is not confined to trade union disputes. Then section 21: "Any dispute may be referred to a Board by application in that behalf made in due form by any party thereto; provided that no dispute shall be the subject of reference to a Board under this Act in any case in which the employees affected by the dispute are fewer than ten." Then section 23: "In every case where a dispute is duly referred to a Board it shall be the duty of the Board to endeavour to bring about a settlement of the dispute, and to this end the Board shall, in such manner as it thinks fit, expeditiously and carefully inquire into the dispute and all matters affecting the merits thereof and the right settlement thereof. In the course of such inquiry the Board may make all such suggestions and do all such things as it deems right and proper for inducing the parties to come to a fair and amicable settlement of the dispute, and may adjourn the proceedings for any period the Board thinks reasonable to allow the parties to agree upon

terms of settlement." During all that time, as will hereinafter appear, the *status quo* has to be maintained. Section 24: "If a settlement of the dispute is arrived at by the parties during the course of its reference to the Board, a memorandum of the settlement shall be drawn up by the Board and signed by the parties, and shall, if the parties so agree, be binding as if made a recommendation by the Board, under section 62 of this Act." Then section 25 deals with the case of a settlement not being arrived at, notwithstanding a long adjournment for the purpose of giving an opportunity to the parties to come to terms. "If a settlement of the dispute is not arrived at during the course of its reference to the Board, the Board shall make a full report thereon to the Minister, which report shall set forth the various proceedings and steps taken by the Board for the purpose of fully and carefully ascertaining all the facts and circumstances, and shall also set forth such fact, and circumstances, and its findings therefrom, including the cause of the dispute and the Board's recommendation for the settlement of the dispute according to the merits and substantial justice of the case." That, as I read the Act, is as far as the Board can carry the matter. The other powers over the parties to the reference I shall refer to in a moment; they are to be found in later sections of the Act. But the usefulness of the Board as a mediator or investigator begins and ends with the recommendation. It has no power to do anything more than set out the facts and findings with regard to the dispute and to make a recommendation for the settlement of the dispute. Then section 26: "The Board's recommendation shall deal with each item of the dispute and shall state in plain terms, and avoiding as far as possible all technicalities, what in the Board's opinion ought or ought not to be done by the respective parties concerned. Wherever it appears to the Board expedient so to do, its recommendation shall also state the period during which the proposed settlement should continue in force, and the date from which it should commence."

LORD ATKINSON: Section 30 is important.

MR. STUART BEVAN: Yes, I am coming to section 30. Section 28 provides for the publication of the Report. One of the learned Judges describes the only action which is open to the Board under this statute as being a sedative action, and, if I may adopt that phrase, it would seem to correctly describe it; it cannot cure the trouble, but it can apply a sedative. "For the purpose of its enquiry the Board shall have all the powers of summoning before it, and enforcing the attendance of witnesses, of administering oaths, and of requiring witnesses to give evidence on oath or on solemn affirmation (if they are persons entitled to affirm in civil matters) and to produce such books, papers or other documents or things as the Board deems requisite to the full investigation of the matters into which it is enquiring, as is vested in any court of record in civil cases." That is very much the same provision, if not identical, with the provision in the Act of 1906, section 23; I think it is in identical terms, but the Lemieux Act goes a great deal further than the earlier one, as your Lordships will see in a moment. Section 31: "The summons shall be in the prescribed form, and may require any person to produce before the Board any books, papers or other documents or things in his possession or under his control in any way relating to the proceedings." Then section 32: "All books, papers and other documents or things produced before the Board, whether voluntarily or in pursuance to summons, may be inspected by the Board, and also by such parties as the Board allows; but the information obtained therefrom shall not, except in so far as the Board deems it expedient, be made public, and such parts of the books, papers or other documents as in the opinion of the Board do not relate to the matter at issue may be sealed up." Section 33: "Any party to the proceedings shall be competent and may be compelled to give evidence as a witness." Then section 30, subsection (2): "Any member of the Board may administer an oath, and the



Board may accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not."

LORD DUNEDIN: It seems to turn on the particularity of these provisions which set up the Board. In order that it may pursue its investigations they give it very ample powers analogous to those of a Court of Law to call people before them to find out the truth, and so on.

Mr. STUART BEVAN: When I proceed to read later sections of the Act your Lordships will see it has powers which no Court of Law has. Then section 33: "Any party to the proceedings shall be competent and may be compelled to give evidence as a witness." Then section 36: "If any person who has been duly served with such summons and to whom at the same time payment or tender has been made of his reasonable travelling expenses according to the aforesaid scale, fails to duly attend or to duly produce any book, paper or other document or thing as required by his summons, he shall be guilty of an offence and liable to a penalty not exceeding one hundred dollars, unless he shows that there was good and sufficient cause for such failure." Section 37: "If, in any proceedings before the Board, any person wilfully insults any member of the Board or wilfully interrupts the proceedings, or without good cause refuses to give evidence, or is guilty in any other manner of any wilful contempt in the face of the Board, any officer of the Board or any constable may take the person offending into custody and remove him from the precincts of the Board, to be detained in custody until the rising of the Board, and the person so offending shall be liable to a penalty not exceeding one hundred dollars."

LORD ATKINSON: Section 38 is an important one.

Mr. STUART BEVAN: Yes, it is very important. "The Board, or any member thereof, and, on being authorized in writing by the Board, any other person"—there is no limitation as to what the class of persons is to be; anybody who in the pleasure of the Board may be authorized—"may, without any other warrant than this Act, at any time, enter any building, mine, mine workings, ship, vessel, factory, workshop, place or premises of any kind, wherein, or in respect of which, any industry is carried on or any work is being or has been done or commenced, or any matter or thing is taking place or has taken place, which has been made the subject of a reference to the Board, and inspect and view any work, material, machinery, appliance, or article therein, and interrogate any persons in or upon any such building, mine, mine workings, ship, vessel, factory, workshop, place or premises as aforesaid, in respect of or in relation to any matter or thing hereinbefore mentioned, and any person who hinders or obstructs the Board or any such person authorized as aforesaid, in the exercise of any power conferred by this section, shall be guilty of an offence and be liable to a penalty not exceeding one hundred dollars." In my submission, that is a very wide invasion of "civil rights".

LORD ATKINSON: Any person obstructing him is made liable to a fine, he shall be guilty of an offence.

Mr. STUART BEVAN: Yes. There is nothing to prevent any other person appointed by the Board being a person who carries on business similar to that, the subject matter of the enquiry, and upon such person presenting himself to his competitor's premises he can make himself master of the position.

LORD ATKINSON: He can examine his rival's books?

Mr. STUART BEVAN: Yes. Then section 56, page 23: "Strikes and Lockouts prior to and pending a Reference to a Board illegal". Then: "It shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes

in the Conciliation and Labour Act: Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike: Provided also that, except where the parties have entered into an agreement under Section 62 of this Act, nothing in this Act shall be held to restrain any employer from declaring a lockout, or any employee from going on strike in respect of any dispute which has been duly referred to a Board and which has been dealt with under Section 24 or 25 of this Act, or in respect of any dispute which has been the subject of a reference under the provisions concerning railway disputes in the Conciliation and Labour Act."

Then Section 57: "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours; and in every case where a dispute has been referred to a Board, until the dispute had been finally dealt with by the Board, neither of the parties nor the employees affected shall alter the conditions of employment with respect to wages or hours, or on account of the dispute do or be concerned in doing, directly or indirectly, anything in the nature of a lockout or strike, or a suspension or discontinuance of employment or work, but the relationship of employer and employee shall continue uninterrupted by the dispute, or anything arising out of the dispute; but if, in the opinion of the Board, either party uses this or any other provisions of this Act for the purpose of unjustly maintaining a given condition of affairs through delay, and the Board so reports to the Minister, such party shall be guilty of an offence, and liable to the same penalties as are imposed for a violation of the next preceding section." Now, my Lords, that position legislated for in that Section 57 would apply to such a case as this.

LORD DUNEDIN: The word "preceding" must be "succeeding", surely?

MR. STUART BEVAN: Yes, I think it must. Then Section 58: "Any employer declaring or causing a lockout contrary to the provisions of this Act shall be liable to a fine of not less than one hundred dollars, nor more than one thousand dollars for each day or part of a day that such lockout exists". It is quite true that those sections deal with numerous matters like lockouts and strikes, but Section 57 also deals with the question of a dispute between master and servant as to the interpretation of an agreement of employment, that comes under Section 2, subsection 7, the interpretation section, where the construction of the particular clause in the agreement would affect 10.

SIR JOHN SIMON: I think "preceding" is right in the section your Lordship refers to, you go back to the preceding section; it is the breach of that section the penalty for which is to be found in the succeeding section.

LORD DUNEDIN: Where are the penalties?

SIR JOHN SIMON: They are found in section 58, and if you want to see what it is that is being violated, it is the violation of the next preceding section. It is a double reference.

MR. STUART BEVAN: Yes, the penalty in section 58 is the penalty for the violation of the proceedings in 56 and 57.

SIR JOHN SIMON: It is section 56.

LORD DUNEDIN: It is curious language. You do not talk of the "next preceding;" "next preceding" is not English.

LORD WRENBURY: You say "last preceding."

MR. STUART BEVAN: Yes. Then section 59 deals with the employee who goes on strike: "Any employee who goes on strike contrary to the provisions of this Act shall be liable to a fine of not less than ten dollars nor more than fifty dollars, for each day or part of a day that such employee is on strike." It deals with the civil rights both of employers and employees, and prevents the employer dealing with his labour as he has the civil right in law to do.



Then section 60: "Any person who incites, encourages or aids in any manner any employer to declare or continue a lockout, or any employee to go or continue on strike contrary to the provisions of this Act, shall be guilty of an offence and liable to a fine of not less than fifty dollars nor more than one thousand dollars."

Then section 61: "The procedure for enforcing penalties imposed or authorized to be imposed by this Act shall be that prescribed by Part XV of The Criminal Code relating to summary convictions."

Then there are "Special Provisions," and section 62 provides: "Either party to a dispute which may be referred under this Act to a Board may agree in writing, at any time before or after the Board has made its report and recommendation, to be bound by the recommendation of the Board in the same manner as parties are bound upon an award made pursuant to a reference to arbitration on the order of a court of record; every agreement so to be bound made by one party shall be forwarded to the Registrar who shall communicate it to the other party, and if the other party agrees in like manner to be bound by the recommendation of the Board, then the recommendation shall be made a rule of the said court on the application of either party and shall be enforceable in like manner." That calls for consent of course.

Then section 63: "In the event of a dispute arising in any industry or trade other than such as may be included under the provisions of this Act, and such dispute threatens to result in a lockout or strike, or has actually resulted in a lockout or strike, either of the parties may agree in writing to allow such dispute to be referred to a Board of Conciliation and Investigation, to be constituted under the provisions of this Act." Really the Special Provisions relate to arbitration by consent.

VISCOUNT HALDANE: Having consented, the property and civil rights may be materially affected.

Mr. STUART BEVAN: Because they consented.

VISCOUNT HALDANE: Because they consented to the whole of the Act as applicable.

Mr. STUART BEVAN: I suppose anybody may forego his civil rights by agreement?

VISCOUNT HALDANE: I am not sure, if you are in Canada and it is something in a Province; it may be that it is for the Provincial Legislature alone to enforce the consequences.

Mr. STUART BEVAN: Yes. I was not looking at it from that aspect; I am obliged to your Lordship. Then section 64, which is headed "Miscellaneous." "No Court of the Dominion of Canada, or of any province or territory thereof, shall have power or jurisdiction to recognize or enforce, or to receive in evidence any report of a Board, or any testimony or proceedings before a Board, as against any person or for any purpose, except in the case of the prosecution of such person for perjury."

Then section 67: "In case of prosecutions under this Act, whether a conviction is or is not obtained, it shall be the duty of the clerk of the court before which any such prosecution takes place to briefly report the particulars of such prosecution to the Registrar within thirty days after it has been determined."

Then section 68 provides for regulations by the Governor in Council: "The Governor in Council may make regulations as to the time within which anything hereby authorized shall be done, and also to any other matter or thing which appears to him necessary or advisable to the effectual working of the several provisions of this Act." Then it deals with the publication of those regulations.

Those are the material sections of the Act, and the contention of the Appellants is that under section 92 of the British North America Act of 1867, the statute, the Industrial Disputes Act, infringes upon the exclusive powers of the Provincial Legislature set out in section 92.

VISCOUNT HALDANE: Do the succeeding Acts of 1910, 1918, and 1920 carry the matter any further?

Mr. STUART BEVAN: No, I do not think so.

VISCOUNT HALDANE: Now we have got the point, just let us see what the provisions of the new Act do.

Sir JOHN SIMON: May I make one qualification; I would ask my friend to read the amending statute on page 29. This particular amendment is the amendment of 1919-1920. My friend Mr. Clauson suggests that we also want page 25. On page 25, section 2 amends sub-paragraph (b) of paragraph 2 of section 15, and then my friend might also read on page 29, section 16; it is only that my Lords may have all the materials.

Mr. STUART BEVAN: First of all Sir John asks me to read on page 25, the amendment of 1910; paragraph 2 says: "Sub-paragraph (b) of paragraph 2 of section 15"—we may just look at that, that is on page 15 and it says the application for the appointment of a Board shall be accompanied by "(a) a Statement," then "(b) A statutory declaration setting forth that, failing an adjustment of the dispute or a reference thereof by the Minister to a Board of Conciliation and Investigation under the Act, to the best of the knowledge and belief of the declarant, a lockout or strike, as the case may be, will be declared, and that the necessary authority to declare such lockout or strike has been obtained." That is amended by substituting, at page 25, subsection 2: "(b) A statutory declaration setting forth that, failing an adjustment of the dispute or a reference thereof by the Minister to a Board, to the best of the knowledge and belief of the declarant a lockout or strike will be declared, and (except where the application is made by an employer in consequence of an intended change in wages or hours proposed by the said employer) that the necessary authority to declare such lockout or strike has been obtained; or, where a dispute directly affects employees in more than one province and such employees are members of a trade union having a general committee authorized to carry on negotiations in disputes between employers and employees and so recognized by the employer, a statutory declaration by the chairman or president and by the secretary of such committee setting forth that, failing an adjustment of the dispute or a reference thereof by the Minister to a Board, to the best of the knowledge and belief of the declarants a strike will be declared, that the dispute has been the subject of negotiations between the committee and the employer, that all efforts to obtain a satisfactory settlement have failed, and that there is no reasonable hope of securing a settlement by further negotiations." There is an important amendment, my learned friend Mr. Lawrence points out, in 1918, on page 26, section 1. "The following paragraph is inserted".

LORD ATKINSON: On page 26, paragraph 3 is a matter of importance.

Mr. STUART BEVAN: I am obliged, I ought to read that: "Paragraph (3) of section 16 of the said Act is amended by adding at the end thereof the following: 'or, where a dispute directly affects employees in more than one province and such employees are members of a trade union having a general committee authorized to carry on negotiations in disputes between employers and employees, and so recognized by the employer, may be signed by the chairman or president and by the secretary of the said committee.'" So that the Act recognizes two classes of dispute, one which is confined to employees in one province, and one which extends to employees outside that province in other provinces, which is directly relevant to the matter in hand.



Then my friend asked me to read on page 29. Before I do that, may I read page 26, the amendment of 1918, section 1: "The following paragraph is inserted immediately after paragraph (d) of section 2 of the Industrial Disputes Investigation Act, 1907, '(dd) A lockout or strike shall not, nor, where application for a board is made within thirty days after the dismissal, shall any dismissal, cause any employee to cease to be an employee, or an employer to cease to be an employer, within the meaning and for the purpose of this Act.'"

LORD DUNEDIN: What does all this come to? That all this is a matter of material interference with civil rights I do not think there is any doubt, but that does not solve the question; the whole question is whether the Dominion Legislature has not a right to do what it has done in respect of its powers, and it is perfectly well settled that it is no answer to say: But civil rights are affected.

Mr. STUART BEVAN: No.

VISCOUNT HALDANE: Of course, it is very difficult. The power to legislate for peace, order and good government is in section 91, and property and civil rights is in section 92, but, on the other hand, the enumeration in section 91 is paramount and prevails, and when you come to this enumeration you find regulation of trade and commerce, and that has been so attenuated by decisions of this Board that it is very difficult to rely on it.

Mr. STUART BEVAN: The respondents, of course, contend here that this is within trade and commerce; I contest that; I say it is within no provision of section 91, but it comes within at least three of the matters exclusively preserved to the Provincial Legislature by section 92.

LORD DUNEDIN: I see that in the Quebec judgment, which is on the point, of course it does not bind us, the court or the judge puts it as mere criminal legislation. He says it is obviously within the power of the Dominion Parliament to say that a strike or lockout is an illegal thing; if you can say that, may not you also say: We will make certain provisions for trying to prevent these things being brought about?

VISCOUNT HALDANE: Unfortunately for that view, we have more than once decided on this Board that the power over the criminal, which is given exclusively to the Dominion under section 91, does not enable it to trench on property and civil rights by merely using that road. If you have something substantial, then you can make any amendment of criminal law giving effect to it, but you cannot usurp power under section 92 under the title of criminal law.

Mr. STUART BEVAN: I had those decisions in mind, and in due course I propose to remind your Lordships of them. The judgment in the Quebec Reports, which I have not seen, I am sorry to say, must be looked at in the light of the decisions of this Board.

LORD DUNEDIN: In the *John Deere Plow case*, I think we decided that where the Dominion exercises power of incorporating a company to trade generally in Canada, it can give it a power which cannot be interfered with under the name of property and civil rights. It is worth looking at. It is in 1915 Appeal Cases.

Mr. STUART BEVAN: Yes, I will refer to it in 1915 Appeal Cases, at page 330.

VISCOUNT HALDANE: That was a Canadian company, not a provincial company, and the province attempted to curtail its powers and so on. We said to some extent they could but they could not substantially.

Mr. STUART BEVAN: I am going to refer to it, and perhaps it would be convenient that I should do so now.

VISCOUNT HALDANE: I think it will be more convenient to take it in its order.

Sir JOHN SIMON: It has been discussed since.

VISCOUNT HALDANE: Yes, in the Board of Commerce case.

Mr. STUART BEVAN: I will read the headnote: "The authority of the Parliament of Canada to legislate for 'the regulation of trade and commerce' conferred by section 91, enumeration 2, of the British North America Act, 1867, enables that Parliament to prescribe the extent and limits of the powers of companies the objects of which extend to the entire Dominion; the status and powers of a Dominion company as such cannot be destroyed by a provincial Legislature. Part VI of the Companies Act of British Columbia (R.S.B.C., 1911, c. 39), which in effect provides that Companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the Province or maintaining proceedings in its Courts, is therefore *ultra vires* the provincial Legislature under the British North America Act, 1867". I can deal with that now, but if it is inconvenient, I will reserve it.

VISCOUNT HALDANE: I think you had better reserve it and take it in its sequence.

Sir JOHN SIMON: There are two more references in the Statutes I want.

Mr. STUART BEVAN: I am reminded that there is a reference in the statute which Sir John asked for on page 29.

Sir JOHN SIMON: I think it would be worth while to complete them by reading page 28, section 6.

Mr. STUART BEVAN: Yes, that is the 1918 amendment: "The said Act is amended by inserting the following sections immediately after section sixty-three thereof: 63 A. Where in any industry any strike or lockout has occurred, and in the public interest or for any other reason it seems to the Minister expedient, the Minister, on the application of any municipality interested, or of the Mayor, reeve, or other head officer or acting head officer thereof, or of his own motion, may, without application of either of the parties to the dispute, strike, or lockout, whether it involves one or more employers or employees in the employ of one or more employers, constitute a Board of Conciliation and Investigation under this Act in respect of any dispute, or strike or lockout" and so on.

LORD DUNEDIN: Do not think me impatient, but I hate a lot of sections being read in an Act of Parliament unless I know what they are being read for. Is there any particular point in any of these sections, except the absolutely general point that undoubtedly in many many ways these sections interfere with civil rights?

Mr. STUART BEVAN: I think not. I am reading this section at the invitation of Sir John Simon.

Sir JOHN SIMON: I was only interposing because the Noble Lord presiding asked whether there was anything else in the Statute relevant. I appreciate your Lordship's enquiry, but we thought them so. The phrase, my friend was not stressing it, is, "where in any industry any strike or lockout has occurred, and in the public interest" and so on it is "expedient"; that is the word that wants to be stressed. It may be it does raise a Dominion consideration.

Mr. STUART BEVAN: We stress the following words, or the alternative words, "or for any other reason".

VISCOUNT HALDANE: Yes, I think you may observe that to be relevant is one thing, and to be material is another.

LORD DUNEDIN: I do not think Sir John would have stated any public interest in that comment, he is for the Dominion.



Sir JOHN SIMON: Yes.

LORD DUNEDIN: You do not want this to be quoted because you think it is public interest; what has the Dominion to do with public interest?

VISCOUNT HALDANE: Sir John was only answering a general question I put.

Mr. STUART BEVAN: I should like to read the other section, if convenient. It is section 16 of the 1920 Act.

LORD DUNEDIN: This is only the same. I am very sorry, but to me many of these things pass into the limbo of forgotten sections.

Mr. STUART BEVAN: I had better leave Sir John to read it. The general character and nature of this legislation is apparent from the terms of the original Act.

LORD DUNEDIN: It interferes grievously with civil rights.

Mr. STUART BEVAN: Yes, and I start with that.

LORD SALVESEN: I understand, if your contention is sound, it is that this Act is a dead letter except in so far as parties may consent to take advantage of it?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Yes, my doubt is whether they can do even that.

Mr. STUART BEVAN: Subject to the observation which Viscount Haldane was good enough to make just now which I should like to have an opportunity of considering; it is subject to that undoubtedly.

Now it is perhaps convenient that I should refer to sections 91 and 92 that have been so often before your Lordships' Board.

VISCOUNT HALDANE: I think it is those that are really the sections to be discussed. You may assume that we have heard of them before.

Mr. STUART BEVAN: Yes, my Lord, they are in the Joint Appendix of Statutes in the earlier pages "Distribution of Legislative Powers. Powers of the Parliament". Then section 91: "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces".

VISCOUNT HALDANE: The first step is, you cut out section 92 altogether?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Now come to the next step and you see you go back on what you have done.

Mr. STUART BEVAN: "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated".

VISCOUNT HALDANE: Section 91; that is a very important section there on which this Board went back on its earlier decision as to the meaning of the words at the end.

Mr. STUART BEVAN: Yes: "And any matter coming within any of the classes of subjects enumerated in this Section shall not be deemed to come within the class of matters of a local or private nature comprised in the Enumeration of the classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

VISCOUNT HALDANE: That was held by one decision to be confined to head 16 in section 92, but afterwards that opinion was declared to be wrong, and this Board has decided that it refers to the whole enumeration.

Mr. STUART BEVAN: Yes. Now the matters upon which the Respondents rely in the Enumeration under section 91 are first of all, (2), "the regulation of trade and commerce" at the bottom of page 1, and (7) "Militia, Military and Naval Service, and Defence," and (27) "the Criminal Law except the constitution of Courts of Criminal jurisdiction, but not including the procedure in criminal matters." Those are the three enumerations that they rely upon; they also contend that this Industrial Disputes Act is for the peace, order and good government of Canada in relation to matters not coming within the class of subject by the Act assigned exclusively to the Provincial legislation.

VISCOUNT HALDANE: That means if the subject-matter does come within section 92 then they can only get at it if they can import that construction which was imported in the *Manitoba Pulp case*?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: And that is a very difficult matter to import; that is for the extreme necessities of war?

Mr. STUART BEVAN: Yes, and for the purpose of enabling them to contend for that construction they called a good deal of evidence in the Court below directed to show, if they could, that a state of national emergency existed.

VISCOUNT HALDANE: Surely there must be a great many other states of national emergency if that was admissible.

Mr. STUART BEVAN: That was the way in which they endeavoured to apply it; they called no less an important witness than the Minister of Labour himself, and they were put to it to know whether the state of national emergency ought to be established as at the date of the passing of the Statute in 1907, or as at the date of the appointment of the Board in 1922.

VISCOUNT HALDANE: If it was not in existence in 1907 the Act would not have been passed, and no good would be done by proving an emergency at the time the Board was appointed unless reappointed. Did the Court decide upon that footing?

Mr. STUART BEVAN: No, my Lord, they did not; I shall be reading the Judgment in a moment. The evidence was not before the Judge who granted the interlocutory injunction. I propose to read the Judgment before I read the evidence or refer to the evidence which was before the Court when the final judgment was given. None of the judges put it upon that ground, but there is the case made upon the evidence and relied upon by the Respondents in this Appeal.

VISCOUNT HALDANE: National emergency?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: You know the curious thing is that the United States who have got a rigidly written Constitution also have the doctrine of national emergency, and so far as I know every country that has a Constitution has got it. In a state of National emergency the provisions which define the Constitution are intended to be overridden and abandoned in order to provide for that emergency; in the United States Supreme Court it has been so held.

Mr. STUART BEVAN: And in the case of the Dominion legislation in the *Pulp case* your Lordships held that.

LORD ATKINSON: It is really requisition.

VISCOUNT HALDANE: The *Pulp case* went further; they could interfere with a newspaper.

Mr. STUART BEVAN: Not only during the war but after the cessation of hostilities on the particular facts of the case.

VISCOUNT HALDANE: We did not say they could, but we said: No Court would interfere with their Judgment.



MR. STUART BEVAN: Yes. There was the very recent case which was put on the ground of national emergency, the profiteering case, or the *Board of Commerce case*.

VISCOUNT HALDANE: There, the decision was with the Province; we said, you cannot do it.

MR. STUART BEVAN: The decision there was with the Province, in the *Pulp case* with the Dominion.

Now it would be convenient if I read the Judgment of the learned Judge who granted the interlocutory injunction because he had the same material before him which I have now placed before your Lordships. His Judgment will be found on page 6 of the Record; it is the Judgment of Mr. Justice Orde: "By virtue of Sections 16 and 17 of 1 George V, chapter 119, and Sections 34 (2) and 36 (1) of the Public Utilities Act, R.S.O. 1914, chapter 204, the Plaintiffs are a body corporate charged with the duty of managing and operating the municipal electric light, heat and power works of the City of Toronto. That duty calls for the employment of a large number of men," etc., etc. (Reading down to the words) "Counsel for the Defendant does not contend that the subject matter of the Act falls within any of the 29 enumerated classes expressly assigned to the Dominion Parliament by section 91, but he says that it does not come within any of the 16 classes exclusively assigned to the provinces by section 92, and that therefore it falls to the jurisdiction of the Dominion Parliament under the residuary power given by the opening words of section 91, as a law made for the peace, order and good government of Canada."

LORD DUNEDIN: The counsel at that stage of the case seems to have given up the idea.

MR. STUART BEVAN: Yes, but at a later stage he came back and relied upon three of the enumerations under section 91.

LORD DUNEDIN: The ones you have read.

MR. STUART BEVAN: Yes; "And he contends that when so legislating the Parliament of Canada may, as ancillary to the main subject matter of the Act, enact laws which interfere with or override civil and municipal rights within the provinces." Then he says: "The features of the Act to which objection is taken by the Plaintiffs are to be found in those sections which interfere with civil rights and not in the innocuous sections which provide some means for settling industrial disputes. It is those provisions for conciliation and those alone that Counsel for the Defendants relies upon as falling within the residuary powers under Section 91 and as justifying the ancillary coercive sections. It may not be amiss to observe parenthetically that it is open to argument that legislation for the appointment of a Board whose sole duty is to endeavour to adjust a dispute but who are clothed with no coercive powers, and whose judgment or award has no binding effect, is not a 'law' at all in the sense in which that word is used in sections 91 and 92 of the British North America Act."

VISCOUNT HALDANE: There is a good deal in that point if you consider what the principle of the British North America Act is; it is that it gives two sets of legislative capacities, one to the Dominion Parliament, the other to the Provincial Parliament, and it is absolutely *ultra vires* in the case of either to trench on the other's field. If that is so, what are these laws that are innocuous? They are nothing at all; if the matter comes within the sphere of the Province the Province ought to disregard them.

MR. STUART BEVAN: There is in fact an Ontario Act in force dealing with trade disputes.

VISCOUNT HALDANE: I should be surprised if there was not in most of the Provinces. I know whenever the Dominion passes an Act of this kind it is promptly followed up by a rival, and then we have to determine which is to prevail.

MR. STUART BEVAN: Then at line 42 the learned Judge goes on: "The same end might be attained by a mere resolution of the House of Commons or of the Senate. Such a resolution could not affect civil rights, and I can see little practical difference between an Act of Parliament or of a Provincial Legislature merely appointing a body for that purpose, and a resolution passed by any deliberate body of men. A municipal council might do it, or any religious or fraternal body might do it, with as much force of law, as the Act in question when stripped of all those provisions which interfere with civil rights or municipal powers. But it is not upon any such construction that my judgment is based. It may be that any Act which the Canadian Parliament or a provincial legislature sees fit to pass is a 'law' within the meaning of sections 91 and 92 of the British North America Act". Then he says the Act is entitled and so on, and then he sets it out; and then I can go to line 37: "It is not necessary to review all the provisions of the Act in detail. Its scheme is very simple." Then there are various references, and then at the bottom of the page he draws attention to the coercive features of the Act "to which exception especially is taken by the Plaintiffs". Then he says: "The Board is empowered to summon witnesses including the parties to the dispute, to compel the production of books, papers and other documents, and to enter buildings and other premises for purposes of inspection, and to interrogate persons therein, and these powers are sanctioned by penalties for failure to attend or to give evidence or to permit inspection". Then the learned Judge refers to sections 56 to 59 which preserve the *status quo*. I think I had better read this: "Sections 56 to 59 contain extremely drastic provisions designed to preserve the *status quo* from the moment the Minister grants the application for a Board until it has made its report," etc., etc. (Reading down to the words) "In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919 (1922), 1 Appeal Cases, 191, at pp. 198 and 199."

VISCOUNT HALDANE: Now we come to the *Pulp case*, and that will take a good deal of time to consider, and therefore we had perhaps better adjourn.

(Adjourned for a short time).

MR. STUART BEVAN: The judgment goes on, on page 10, line 45: "The recent judgment of the Judicial Committee delivered on the 25th July last, in the case of Fort Frances Pulp and Paper Company v. Manitoba Free Press Company, might lend colour to the suggestion that there may be cases notwithstanding what was laid down in the Montreal Street Railway case, where in a 'national emergency' the Parliament of Canada may have power to pass legislation under the residuary clause infringing upon provincial rights.", etc., etc. (Reading to the words, line 32) "The authority of that decision has been so affected by later decisions of the Privy Council that I do not feel that it is binding upon me or that it is now a correct exposition of the law."

LORD DUNEDIN: Does that matter, because it is all about the interim injunction?

MR. STUART BEVAN: Yes; I need not trouble your Lordships with that. That is how the matter stood when the injunction was granted. The only statute that I have not referred your Lordships to is the statute under which the Toronto Commissioners derive their powers, and it will, perhaps, be right that I should give your Lordships the reference to that.

VISCOUNT HALDANE: Tell us the substance of it?

MR. STUART BEVAN: The substance is that the power which the municipality had are all conferred upon these Commissioners.

VISCOUNT HALDANE: It is a statutory delegation.

MR. STUART BEVAN: Yes, a convenient delegation.



VISCOUNT HALDANE: The municipality would require power to regulate the organisation of the City of Toronto, but that, I take it, they have.

MR. STUART BEVAN: Yes, no issue really arises on that. I think it may be taken just as if the municipality themselves were the plaintiffs in the action.

VISCOUNT HALDANE: I suppose they said: This is a municipal institution within the Province?

MR. STUART BEVAN: I ought perhaps, before I deal with the evidence that was called, to tell your Lordships that there is an Ontario Act of 1914, which is to be found at page 38 of the Joint Appendix, entitled "An Act respecting Councils of Conciliation and of Arbitration for settling Industrial Disputes."

LORD SALVESEN: How do the provisions differ from the other ones?

MR. STUART BEVAN: There is not the same interference with property and civil rights, but there is a complete procedure provided for the reference.

VISCOUNT HALDANE: That is only to show that they have acted.

MR. STUART BEVAN: Yes, that is really all. I do not think I need trouble your Lordships with the terms of that.

VISCOUNT HALDANE: I do not think we are much troubled here with the old doctrine of the occupied field; it originated in Victorian times, and, although it has been recognised more and more as time goes on, as the two sets of legislatures have crowded one another, you come back to the question of whether it is *ultra vires* or *intra vires*.

MR. STUART BEVAN: Yes, I think that position was recognised by the respondents, because at the trial they put their case, it is true, upon section 91, and said that it did not come within section 92 at all, but mainly they based their case upon an allegation of national emergency, and, in order to meet that case, they called a good deal of evidence.

VISCOUNT HALDANE: Before you go into the evidence, let us see what "national emergency" means. If a hostile force is invading a country, notwithstanding its constitution, the people of that country will rise and resist, and organise themselves in order to attain its end. That has been recognised, I think, by the United States, where I do not think there was much controversy about it; I think everybody said that must be so, but it was said: In the United States it is not so very easy to find such a power within the constitution, but it was said: There is power to make laws for the peace, order and good government of Canada, except with regard to matters within section 92. Then it was said that an emergency which threatens Canada as a whole does not come within section 92, and, therefore, Parliament is free to proceed affirmatively under the general words of section 91. That is a very different thing from legislation as regards strikes, which is very important legislation, but each Province can deal with it.

MR. STUART BEVAN: Certainly this particular province is dealing with it.

VISCOUNT HALDANE: The important thing against you is that the Lemieux Act, which was acquiesced in, as far as I know, was put forward for the whole of Canada, as a sort of natural construction of the powers of section 91.

MR. STUART BEVAN: Your Lordship says "acquiesced in."

VISCOUNT HALDANE: It has gone on since 1907.

MR. STUART BEVAN: It has gone on since 1907, but the statement is that in the case of municipal authorities no board has ever been appointed, where their interests are concerned, except with the consent of those authorities.

LORD ATKINSON: What is the difference between a municipal Board and a Board under section 92?

MR. STUART BEVAN: Under section 92 there is an express field.

LORD ATKINSON: If you cannot invade the civil rights of the board, can you invade the civil rights of an individual?

Mr. STUART BEVAN: No, you cannot; but I have the additional ground, being a municipal corporation, to put forward under section 92, which would not be open in the case of a private employer. There is exclusive power in the provincial legislation under section 92 in respect of municipal institutions in the province.

VISCOUNT HALDANE: If you could rely upon the regulation of trade and commerce, that would be enough for you. It may be that the decisions of this board require a good deal of interpretation before you can rely upon that as giving this power; otherwise I should have thought they did give this power.

Mr. STUART BEVAN: For that one would have to consider the various decisions, and the question of trade and commerce was dealt with by your Lordships in one of the recent cases, the Board of Commerce case.

VISCOUNT HALDANE: And the John Deere Plow case and the others.

Mr. STUART BEVAN: Yes, and, so far as I am concerned, though, as your Lordship has reminded me, there is a large body of judicial decision by this board upon this class of case, the whole of the law is dealt with and summarized in the two last cases before your Lordships' Board. It may be necessary to refer to some of the earlier decisions perhaps to expand the references. But my case is really based upon the reasoning of your Lordships' Board in those last two cases in 1921 and 1922.

VISCOUNT HALDANE: In the Board of Commerce case we did say something about trade and commerce.

Mr. STUART BEVAN: Your Lordships dealt with what trade and commerce was within the meaning of section 91, and as to whether the position could be covered by trade and commerce in the particular case under consideration. I shall have to deal with it when I come to the cases, but I thought the most convenient way, as this is put well to the front of the respondents' case, would be to deal with the evidence relied upon as showing that there was a position of national emergency both at the date of the passing of the statute and at the date of the order constituting the board.

LORD ATKINSON: I can understand national convenience.

VISCOUNT HALDANE: That will not do.

Mr. STUART BEVAN: I suppose it was for the national convenience and certainly in the national interest that profiteering should be restrained in the years immediately following the war, but that is not an emergency.

VISCOUNT HALDANE: An emergency is something so terrible as to be outside anything in section 92, such as the Dominion being in peril.

Mr. STUART BEVAN: Yes. In my submission no such case could be made here and the sort of evidence which has been led to establish such a case falls far short of anything in the nature of a national emergency.

VISCOUNT HALDANE: May we see the judgment on the main question and then we can come back to the evidence.

Mr. STUART BEVAN: If your Lordship pleases. I have read the judgment of Mr. Justice Orde. Then there is the judgment of Mr. Justice Mowat which led to the reference of the action to the Supreme Court. That is on page 166. He says: "This action is for a declaration that the defendants have no right to act as a Board of Conciliation and Investigation in respect of an alleged dispute between the plaintiffs and their employees," etc., etc. (reading to the words, line 32), "that such requirements are necessary and that the effective or possible determination of industrial strife gives the Dominion Parliament power so to trench upon the subjects mentioned in subsections 8, 13 and 16



of section 92, in order that a law necessary for 'the peace, order and good government of Canada' may be effectively administered and enforced." That is a consideration of national emergency. "Having come to the conclusion that the constitutional question raised is the all important one, I do not here deal with the evidence directed to that feature of the case which deals with the procedure leading up to the appointment of the Board of Conciliation which was made, and the propriety of its appointment. In a general way I find that the requirements of the statute have been complied with. I therefore pass on to discuss the constitutional point raised. The question of industrial strife, together with its ramifications and the growth of labour unions, is vastly different from the condition existing at the time of the passing of the British North America Act in 1867, and the silence of the Act regarding 'labour' and the absence of the specific allocation of that subject to the Dominion or the provinces is thus accounted for. But it may be observed that the question of labour has, for more than twenty years, been appropriated by the Dominion Parliament and Government. There is a Department of Labour with a Minister of Labour in charge; periodical publications dealing with labour questions, the labour market, the current cost of living, and the employment of the military forces of Canada in the protection of property and the public safety where violent eruptions have occurred or may."

VISCOUNT HALDANE: The Ministry of Labour is quite a recent thing, is it not?

MR. STUART BEVAN: It was established by the Act of 1906 which is to be found on page 4 of the Appendix. My friend, Mr. Duncan, tells me that the original Act was in 1900. This is 1906. It does not refer to the 1900 Act, but my friend is in a much better position to know than I am and when he says there was a similar Act of 1900, I have no doubt that is so. This is the Revised Statutes of Canada of 1906. I have no doubt my friend is right. Then line 10: "This Department has, by common consent of the Provinces during this long period, been the principal administrative means of dealing with the question of eruptive industrial strife; and, while the fact of acquiescence does not settle a constitutional point of law, and if there is no authority for the taking over of labour problems by the Dominion, yet a declaration of the Court that all such administrative actions are to cease, and inferentially that all the Governments and their law officers have erred, or slept, should not be arrived at unless the law is clear." May I pause there for a moment to say on this suggestion of acquiescence, the only evidence of acquiescence is that in the case of municipal institutions the Minister of Labour has always sought and obtained their consent before appointing the Board. In the case of individual firms and private companies it is true that no one has taken objection except in the one case which has found its way into the Law Reports. "Canada's constitutional problems have all found their way to the Judicial Committee of the Privy Council, whose members have taken enormous pains, from period to period, in their elucidation, and it is by the views of that tribunal that we are to be guided," etc., etc. (Reading to the words, page 169) "simple local strikes which alone could have been in contemplation of the Fathers in 1864 and 1867 have given place to those of Brotherhoods composed in some instances of hundreds of thousands and Dominion-wide in their operations and probably beyond the resources of each Province to deal with." The number dealt with by this particular piece of legislation is as low as ten. "As was said by Lord Watson in stating the opinion of the Judicial Committee in Attorney General for Ontario v. Attorney General for the Dominion (1896) A.C. 348. 361: 'Some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest

of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.'"

LORD ATKINSON: I suppose the Dominion could deal with foot and mouth disease over the whole of Canada.

Mr. STUART BEVAN: I should think so undoubtedly. Agriculture is assigned to the Dominion Parliament. "In *Russell v. The Queen* it was held that the restriction of intemperance was a matter of public order and safety, although it infringed on property and civil rights. And this case, although the Attorneys General were not represented, has been expressly reaffirmed in statements by the Committee." I think, as your Lordships will see when I refer to the decision, that, turned upon the particular facts of that case. "If such an ill as occasional over-drinking is subject to Dominion legislation, it must follow that the prevention of strikes by conciliation, which conceivably might occasion the starving of the people, should also be. In the last case on the subject, it was held that regulation of the price of newsprint paper, upon which soothing and uninterrupted information might be written to quiet the nerves of the people racked by the Great War, but which was over when the regulation was passed, was within the powers of the Dominion, the Viscount Haldane saying: 'No authority other than the central Government is in a position to deal with a problem which is essentially one of statesmanship.' The elements of 'municipal affairs' and 'matters of a merely local and private nature' come within the same reasoning. I note that Mr. Justice Orde in this very case reported 25 O.W.N. 64 heard a motion for an interim injunction upon material which substantially raised the same issue as that raised by the evidence at the trial before me, and gave a considered judgment." That deals with the learned Judge's ground for referring the case to the Divisional Court.

Then the judgment of the Supreme Court is to be found on page 171. The Chief Justice says: "I agree with my brother Ferguson that the impugned portion of the legislation in question is legislation within the competency of the Dominion Parliament under its powers to make laws for the peace, order and good government of Canada in relation to the regulation of trade and commerce, and, therefore, think the action should be dismissed with costs." Then Mr. Justice Ferguson gives the reasons. The first ten lines deal with the reference to the Divisional Court and at line 18 he says: "The Plaintiffs are a Board of Commissioners appointed under Sections 16 and 17 of 1 George V, Chapter 119," etc., etc. (reading to the words, line 46) "it is an interference with a local work or undertaking, subjects (Class 10) exclusively assigned to Provincial Legislatures by Section 92 of the British North America Act." Then he sets out the relief asked for. The second paragraph refers to the injunction that was ordered and the third paragraph deals with the circumstances under which the matter comes before the Supreme Court. I will go to line 33, page 172.

Mr. DUNCAN: Will you read at line 28?

Mr. STUART BEVAN: Certainly. "It is not, I think, necessary for the decision of the case at bar, to consider the constitutional validity of any sections or provision in this Act which do not deal with the powers of the Board, and consequently it is not necessary to consider the constitutional validity of Sections 56 to 61 which deal with strikes and lockouts prior to and pending a reference to a Board of Inquiry," etc., etc. (Reading to the words, line 13, page 173) "Counsel for the Defendants and the Attorney General for the Dominion submitted that, as according to its 'true nature and effect', its 'pith and substance', and its title, the Act here in question is legislation in reference to industrial disputes, and as



the Imperial Parliament in the Australian Constitution Act (63-64 Victoria) recognized and treated industrial disputes as presenting an aspect of peace, order and good government that required special legislative treatment, (see Section 51 of the Australian Act)"—that comparison does not seem to be very helpful—"we may and should hold that the legislation does not fall within any of the classes enumerated in Section 92 of the British North America Act", etc., etc. (Reading to the words, line 40) "the Parliament of Canada had not by its general power 'to make laws for the peace, order and good government of Canada' full legislative authority to pass it". In the Russell case it was held it did not fall within either of the classes of Section 92. The Alberta case referred to is in 1916 Appeal Cases. "It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of Section 91 of the British North America Act confers, does not, unless the subject matter of legislation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject matters entrusted to the provincial Legislatures by the enumeration in Section 92. There is only one case, outside the heads enumerated in Section 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject matter lies outside all of the subject matters enumeratively entrusted to the province under Section 92". Russell v. The Queen is an instance of such a case.

VISCOUNT HALDANE: Objection has been taken to the enunciation of the law in Russell v. The Queen.

MR. STUART BEVAN: The quotation from the Alberta case is from the judgment of this Board delivered by your Lordship.

VISCOUNT HALDANE: We adopted Russell v. The Queen as right to that extent.

MR. STUART BEVAN: Yes, so far as the construction of Section 92 was concerned. "Counsel for the Plaintiffs and the Attorney General for Ontario submit that the legislation here in question trenches upon the classes of legislation enumerated in subsections 8, 10, 13 and 16 of Section 92", etc., etc. (Reading to the words, line 41) "In the Board of Commerce Case Mr. Justice Duff's statement does not take the form of a pronouncement on a point necessary to the decision of the case he was considering". In the Distillers and Brewers Case (1896) Appeal Cases—that was a judgment delivered by Lord Watson—"the Committee states the proposition as it is stated by Mr. Justice Duff in the Board of Commerce Case, and yet in the same case accepts and treats Russell v. The Queen as rightly decided".

VISCOUNT HALDANE: I think in Russell v. The Queen what they proceeded on was that the scope of the Canada Temperance Act was so wide and concerned the Dominion so much as a whole that the matter was really outside Section 92 and they decided it on that footing and there were suggestions as to trade and commerce that were not adopted in subsequent decisions.

MR. STUART BEVAN: As I read the judgment the Board held that they did not fall within Section 92 at all on the particular facts in that case and having regard to the particular scope and extent of the legislation in question.

VISCOUNT HALDANE: There were some very critical remarks in Russell v. The Queen made by Lord Watson in a case that is not in the reports with regard to the McCarthy Act. It has been printed, but it is not in the reports.

MR. GEOFFREY LAWRENCE: In the judgment in the Insurance Reference of 1916 your Lordships referred to the case on the McCarthy Act.

VISCOUNT HALDANE: Did we quote what was said in that case?

MR. GEOFFREY LAWRENCE: Your Lordship said you had no difficulty in holding it was *ultra vires* notwithstanding Russell v. The Queen.

MR. STUART BEVAN: I have here the argument in the Great West Saddlery case.

VISCOUNT HALDANE: More than once since objections have been taken to quoting remarks that were made by their Lordships, probably rather precipitately, in the course of the discussion as indicating their settled view. In the McCarthy Act case this Board gave no reasons for its judgment. It simply pronounced the Act *ultra vires*.

MR. STUART BEVAN: Would your Lordships desire me to read the passage from the Great West Saddlery case?

VISCOUNT HALDANE: We will come to that in due course.

LORD ATKINSON: They criticized the argument in Russell v. The Queen.

MR. STUART BEVAN: Yes. Mr. Justice Ferguson goes on at the top of page 175: "After a careful persual of the authorities, I am unable to reconcile the cases or the two propositions in the statement I have quoted from the Alberta Insurance Case, unless it be that the legislation in Russell v. The Queen did not, in the opinion of the Judicial Committee, even trench upon any of the powers conferred upon the provinces by Section 92"—I think that is right, if I may say so with respect—"or unless it be that the opinions of the Judicial Committee in Russell v. The Queen and in the Fort Frances Case are founded upon the proposition that, where a condition arises in which the peace, order and welfare of the Dominion as a whole is affected and that condition cannot be effectively met, controlled and regulated by provincial legislation, the Dominion Parliament has power to legislate under the peace, order and good government clause of Section 91 even if in so doing it trenches upon some of the classes enumerated in Section 92. While there are statements in the reasons for judgments in the Russell Case and the Fort Frances Case which appear to support the last proposition, it is not, I think, clear that the proposition was necessary to the decision of either case or that it is laid down in either case. In the absence of clear and binding authority requiring me to do so, I am not prepared to hold that such a wide and far-reaching power must, can or should be implied in order to give effect to the agreement which the Imperial Parliament embodied in the British North America Act."

LORD ATKINSON: I suppose that would apply where there was a plague of some sort, cholera, for instance.

MR. STUART BEVAN: Yes.

LORD ATKINSON: In India they are obliged to deal with that in great districts. People are not allowed to shift from one stricken district to another.

MR. STUART BEVAN: I suppose plague would come under the description of a national emergency or peril.

LORD ATKINSON: It is not confined to war.

MR. STUART BEVAN: No, I do not think I could contend that; it would be a national emergency. "I incline to the view that if the Russell Case is not supported by a reference to subsection 27 of Section 91, criminal law, and subsection 2, trade and commerce, then it must be taken to have been determined on a finding that the legislation did not in fact trench upon any class enumerated in Section 92 and that the Fort Frances Case is based upon a finding of such an abnormal condition that the necessities of the situation demanded, required and justified the implying of an overriding power to legislate so as to meet, regulate and control an abnormal condition amounting to a great national emergency, in which the safety of the nation as such was threatened."

VISCOUNT HALDANE: No doubt that is so, but you will find somewhere, I am not sure it was not in the 1906 case, a judgment of this Board in which they said it was impossible to reconcile the Russell Case with the decision in



the Ontario Liquor case. I was Counsel in the case. For a time no self-respecting Counsel cited the Russell case before this Board; there was a gloomy silence whenever he did, but I think we have got over that now.

MR. STUART BEVAN: Perhaps it is because I am not very familiar with these earlier decisions that I have introduced the Russell case. I submit that the judgment of Mr. Justice Ferguson in this passage between lines 18 and 30 is correct in the reasons he assigns for the particular finding in the Russell case and the Fort Frances case.

VISCOUNT HALDANE: The judgment in the Russell case was delivered by a very eminent authority on the British North America Act, Sir Montague Smith.

MR. STUART BEVAN: Yes. Then at line 30: "For these reasons I am of opinion that the weight of authority is in favour of the proposition that, except in conditions involving the very safety of the Dominion as a political entity, the Parliament of Canada may not in its legislation trench upon any of the subjects enumerated in Section 92, unless such legislation, according to its pith and substance, is legislation in relation to a class of legislation enumerated in Section 91 of the British North America Act."

VISCOUNT HALDANE: Surely that is too broad.

MR. STUART BEVAN: If it trenches upon any subject enumerated in Section 92, it is *ultra vires* unless according to its pith and substance it is legislation in relation to Section 91. "Counsel for the Attorney General for the Dominion and the Defendants submit that if the legislation cannot be supported as not falling within or trenching upon any of the classes enumerated in Section 92, it can and should be supported as legislation in respect of one or more of the classes enumerated in Section 91 of the British North America Act," etc., etc. (*Reading to the words, line 1, page 177*) "Industrial disputes are not now regarded as matters concerning only a disputing employer and his employees."

That must depend upon the particular dispute and the facts of the particular case: "It is common knowledge that such disputes are matters of public interest and concern, and frequently of national and international importance," etc., etc., (*Reading down to the words*) "I would dismiss the action with costs including costs of injunction proceedings but would stay the issue of the judgment and the order dissolving the injunction restraining the Defendant from proceedings with the inquiry for such time as is reasonably necessary to allow an appeal to be taken." Then Mr. Justice Smith and Mr. Justice Magee agree.

The view expressed by the learned judge here at lines 14 and 15 on page 177 that it is an Act "to authorize an inquiry into conditions or disputes and that the prevention of crimes, the protection of public safety, peace and order and the protection of trade and commerce are of the 'pith and substance and paramount purposes' of the Industrial Disputes Act" would hardly seem to be in accordance with the provisions of the Act itself, because, taking the view which is expressed by the learned Judge, one would have thought some drastic remedy would be provided by the Act itself in order to prevent the continuance or recurrence of a condition so dangerous to the public safety, peace and order, and when one looks at the Act itself one sees there is no drastic remedy provided by the Act and no real effective remedy at all. All the Act provides for is that, in this alleged condition of a breach of public safety, peace and order, three gentlemen should meet together and, if they are unable to settle the industrial dispute, should publish an accurate statement of the case leading up to the dispute and a pious recommendation that the parties should settle that dispute upon particular lines. The very nature of the Act and of the machinery of the Act seems to negative the existence of a state of things seriously affecting public peace and order which in ordinary circumstances would call for drastic means to be applied for the removal or alleviation of the dangerous position.

Then Mr. Justice Hodgins on page 178 gives a dissenting judgment in favour of the Appellants. I do not think I need read the first two paragraphs. In the third paragraph he says: "It was suggested during the argument that, as the Act was passed in 1907, it must be viewed and judged in relation to the industrial and social conditions which existed at that date, irrespective of what has happened since," etc., etc. (*Reading down to the words*) "'Dispute' and 'industrial dispute' are defined"; then they are set out. Then strikes and lock-outs are defined, and then at line 18: "It is provided that no dispute shall be referred to a Board where the employees affected are fewer in number than ten (section 21) and by Section 6 the Minister is obliged to establish the Board if satisfied that the provisions of the Act apply. How he is to satisfy himself that there are at least ten persons affected is not stated". Then the learned Judge sets out Section 30 as to the powers to compel the attendance of witnesses and to accept evidence whether strictly legal or not. Then the other sections dealing with failure to attend and produce books are set out. Then section 56 is referred to at line 40, and then section 57, the *status quo* provision, and then at the top of page 182: "Any violation of these provisions subject the party offending to a fine to be recovered by proceedings under Part XV of the Criminal Code." Then the judgment proceeds: "The salient features objected to are," etc., etc. (*Reading down to the words on page 186*) "If, in the latter quotation the words 'for prohibiting strikes and lock-outs throughout Canada except under restrictive conditions' are substituted for those referring to the liquor traffic, the analogy is obvious and something similar may be said about the other extract".

VISCOUNT HALDANE: I do not think I was expressing any opinion on the Russell case in quoting it there. I was really saying what the reasons were.

Mr. STUART BEVAN: Yes, my Lord. Then: "In the case of Attorney General for Ontario v. Attorney General for Canada (1896) Appeal Cases 348, these words occur on page 361," etc., etc. (*Reading down to the words on page 187*) "In Attorney General for Australia v. Colonial Sugar Company (1914) Appeal Cases, page 252, Lord Haldane sums up the earlier pronouncements in these words: 'By the 91st section a general power was given to the new Parliament of Canada to make laws for the peace, order and good government of Canada without restriction to specific subjects, and excepting only the subjects specifically and exclusively assigned to the Provincial Legislatures by section 92'". Then there is a passage in the judgment delivered by your Lordship in the Attorney General for Canada v. The Attorney General for Alberta which I have already read twice.

VISCOUNT HALDANE: You need not read that again, it adds nothing.

Mr. STUART BEVAN: Then the judgment proceeds: "I find these careful pronouncements by Lord Haldane to be reinforced in the Board of Commerce and the Fort Frances cases" etc., etc. (*Reading down to the words on page 189*) "Indeed, it would be difficult to assign limits to the measure in which, by procedure strictly analogous to that followed in this instance, the Dominion might dictate the working of provincial institutions and circumscribe or supersede the legislative and administrative authority of the provinces".

LORD ATKINSON: Obviously in such a case as that the criminal jurisdiction would not be to form a body of criminal law, but to have a penal section as a means of enforcing it.

Mr. STUART BEVAN: Similarly in this case the only way of forcing the parties to the Board is by forcing them to give disclosure of their books and works and so forth, and forcing them to maintain the *status quo* by imposing these penalties for any disobedience of an Order of the Board; without the penalties the Act would be ineffective, without the other provisions of the Act,



of course, there would be no necessity to have penal provisions at all. Then the judgment proceeds on page 190: "Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian constitution as enunciated and established by the judgments of this Board. The language of sections 91 and 92 (which establish 'interlacing and independent legislative authorities,')"—

LORD DUNEDIN: This is Lord Haldane now?

Mr. STUART BEVAN: Yes, this is Lord Haldane after quoting from Mr. Justice Duff—"Great West Saddlery v The King being popular rather than scientific, the necessity was recognized at an early date of construing words describing a particular subject matter by reference to the other parts of both sections. As Sir Montague Smith observed, in a well-known passage in the judgment in *Citizens Insurance Company v Parsons*, 7 Appeal Cases at page 109, 'The two sections must be read together and the language of one interpreted and, where necessary, modified by that of the other.' The scope of the powers received by the Dominion under Item 27, section 91, is not to be ascertained by obliterating the context, in which the words are placed, in disregard to this rule.'" Then the judgment proceeds: "If, therefore, this legislation is one substantially in relation to property and civil rights, this case applies and governs here," etc., etc. (*Reading down to the words*) "I think the appeal must be dismissed with costs and judgment entered for the Respondents in the action, in accordance with these reasons, for the relief they seek, with costs." That is the consequential relief.

Now my case is really based upon the reasoning of Mr. Justice Hodgins, which, as your Lordships observe, dealt in great detail and care with the case.

VISCOUNT HALDANE: What do you say is the difference between the two Judges in the Court of Appeal on the law?

Mr. STUART BEVAN: I do not think there is really any difference in the views that the Judges took as to the principles laid down in those various decisions that have been pronounced by your Lordships' Board, but Mr. Justice Ferguson finds two things; he finds undoubtedly that the matter came within section 92 "civil rights and property within the province," but he found in addition to that that the legislation is covered by two of the enumerations in section 91, namely, "criminal law" and "trade and commerce." That is the only distinction between the judgments.

Now with regard to criminal law, Lord Atkinson just put the question, my answer to which indicates the submission I make with regard to that.

LORD ATKINSON: It is not a provision widening the criminal law, but a penal provision enacted to enforce an *ultra vires* statute.

Mr. STUART BEVAN: Yes.

LORD ATKINSON: Without which the Act would be a dead letter.

Mr. STUART BEVAN: Yes. That is my answer to the finding or the view expressed by the majority of the Judges, that this is covered by "criminal law." With regard to "trade and commerce," the answer, I submit, is by the dissenting judgment of Mr. Justice Hodgins in which he reviews the cases in which the phrase "trade and commerce" has been considered.

LORD ATKINSON: It would be competent to indicate any of these things come under section 92; they said, you shall do such and such things which are an invasion of them, and if you do not do them you are to be fined.

Mr. STUART BEVAN: That is it, you are transferred, according to the Respondents' case, from this particular enumeration under section 92 into a sub-division or sub-enumeration of the criminal law enumeration in section 91; that is the effect of it.

VISCOUNT HALDANE: Mr. Justice Orde gave judgment for an injunction, taking the view that the Act was valid. Mr. Justice Mowat heard the evidence and said: I do not agree with this, and referred the case to a full Bench; the full Bench agreed with Mr. Justice Mowat for substantially the same reasons, and said the new Act was *ultra vires*.

Mr. STUART BEVAN: No, the majority of the full Court confirmed Mr. Justice Mowat.

VISCOUNT HALDANE: I mean that, but Mr. Justice Mowat's judgment refusing the injunction confirmed that the new Act was *ultra vires*.

Mr. STUART BEVAN: No, treated it as being *intra vires*. Mr. Justice Orde granted the injunction on the view that the new Act was *ultra vires*. Mr. Justice Mowat, the trial Judge, took a different view, and gave a considered judgment for giving a different view, but he pronounced no order in the action; he took advantage of procedure which was open to him, by which the whole action could be referred to the full Court. The matter then came before the full Court, and the majority of the Judges took the view that the Judge who granted the injunction on the view that the Act was *ultra vires* was wrong, and held that the Act was *intra vires*, because it fell within the enumeration of "trade and commerce" and "criminal law." Mr. Justice Hodgins took the other view; he held it was within section 92 and was not within any of the enumerations in section 91; that is the position.

VISCOUNT HALDANE: The new Act?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: And therefore was *ultra vires*?

Mr. STUART BEVAN: According to the dissenting judgment. I come here with the finding of the majority of the full Court against me, the majority held that the new Act is *intra vires*; it is that judgment I am appealing from and seek to have reversed.

VISCOUNT HALDANE: You have Mr. Justice Hodgins with you?

Mr. STUART BEVAN: Yes, and the Judge who granted the interim injunction.

VISCOUNT HALDANE: The curious thing is, in stating the law they come so near each other.

Mr. STUART BEVAN: Yes, they do, and really the only distinction between the majority in the Supreme Court and Mr. Justice Hodgins is that the majority against Mr. Justice Hodgins did find that this legislation fell within section 91 under both the enumerations "trade and commerce" and "criminal law." That is really the whole point.

LORD DUNEDIN: I would like to be quite sure about this, as the adjournment will be long. Mr. Justice Mowat rather went upon the question of the general view that the thing became of such importance that it would be of Dominion as against local importance, whereas the Judges in the Appeal Court say this may be tacked on the enumerated subjects?

Mr. STUART BEVAN: Yes, so that I shall have to deal with the three views.

LORD DUNEDIN: Their views differed?

Mr. STUART BEVAN: Yes, and I shall have to deal with Mr. Justice Mowat's view as well as with the others.

(Adjourned until Tuesday morning)



## SECOND DAY

COUNCIL CHAMBER, WHITEHALL, S.W. 1,

TUESDAY, November 18, 1924.

VISCOUNT HALDANE: Before you begin, it might be convenient to say this: The practice of the Board is to hear just two counsel a side normally and when two Governments are here the usual thing is that the leader for the private appellants and counsel for their Government should be heard, and similarly with the Respondents, but I am not sure how matters stand in that respect. You, Mr. Bevan, appear for the private appellants and also appear for the Government of Ontario?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Then it is quite simple in that case, there are two counsel on your side?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: With regard to the other side it is not so clear; Sir John Simon appears for the private Respondents.

Sir JOHN SIMON: Yes, I appear with my friend, Mr. Duncan, for the Respondents.

VISCOUNT HALDANE: Mr. Clauson appears for the Attorney General of Canada?

Sir JOHN SIMON: Yes; that is a very important aspect of the case.

VISCOUNT HALDANE: I see Mr. Duncan used the labouring oar in the Courts below and might naturally wish to add something to your argument, and in that case their Lordships will depart from their usual practice and hear you Sir John and also Mr. Duncan, and then also hear Mr. Clauson. Probably Mr. Duncan will not find it necessary to be very long, but that depends, of course, on the argument that you, Sir John, address to this Board.

Sir JOHN SIMON: Might I say this to relieve the Board, and to save the time of the Board, what I should propose to do in any part I am called upon to take would not be to trench on the evidence side of it. It may be we shall have to have some discussion, but as your Lordships have intimated that course I should propose to leave with my friend Mr. Duncan whether he did or did not deal with that, but your Lordships would not expect me to deal with the possibly rather complicated matter of the evidence if it becomes important.

VISCOUNT HALDANE: If it becomes important; it may not be important. That brings me to the second observation I wish to make. It is a very delicate case, and a very difficult and serious one, and I think it must turn to a large extent at any rate on what this Board and the Courts of Canada have already decided on the construction of sections 91 and 92. That being so, I am afraid you will have to take us through the authorities. There is nothing earlier than *Russell v. The Queen* that we need look at if my recollection does not deceive me, but I have not had the books before me. I think *Hodge v. The Queen* is in the same volume?

Mr. STUART BEVAN: It is 9 Appeal Cases.

VISCOUNT HALDANE: You can tell us what was in the McCarthy Act and what was decided without reasons there. I think it is in the discussion in that bound volume where some of the observations that were made about *Russell v. The Queen* occur, but you must not take observations made by the Judges, no matter how eminent, as of the same weight, when only made in conversation, as the delivered judgments, and you will be very sparing in the citation of sentences of Lord Herschell and Lord Watson and what they said in that case. Do you remember what year the *McCarthy* case was; it was after *Hodge v. The Queen*?

MR. STUART BEVAN: I had proposed, with your Lordships' approval, to start with the latest decisions of your Lordships.

VISCOUNT HALDANE: I think you may assume we know the latest ones.

MR. STUART BEVAN: I am relying upon those as summarising many of the earlier decisions.

VISCOUNT HALDANE: I will tell you why that is dangerous; in all those cases we had been addressing ourselves to particular questions, and we have had in mind to try not to decide any more than was necessary for the decision of each case. The result is it is only in that way you can work out the general principles.

LORD DUNEDIN: If it is allowable to quote one's own judgment, there is a certain judgment of mine in a Workmen's Compensation case which is often quoted by other people as to how you said something in a decided case and then something else is decided and you push on and push on until at the end you get something which if you had the Statute alone you would think would never come under it.

MR. STUART BEVAN: Then, my Lord, I will start with the earlier cases.

VISCOUNT HALDANE: I think in that case it would probably be the best to see exactly what was decided in *Russell v. The Queen*.

MR. STUART BEVAN: If your Lordship pleases. There is one matter which falls to be dealt with before I refer your Lordship to *Russell v. The Queen* and the later cases, and that is the evidence which occupies a good many pages of the Appendix. The evidence was directed to showing a case of public emergency, but in none of the judgments was the decision in favour of the Respondents based upon that ground at all.

VISCOUNT HALDANE: I know, in the *Manitoba Pulp* case, their Lordships decided that war overrides everything, and it affects Canada as a whole in the result. We had to consider peace, order and good government under the circumstances of the presence of the war which are outside political heads, and when that has once been done the point at which Legislation is to cease must be a matter of statesmanship; it is impossible for a Court to say as well as the Government can when that is to stop: that is all that was decided. Now is what emerges here, or in any other case, compatible to the emergency of war? In *Russell v. The Queen* they seem to have thought there was such an emergency, and that has been a subject of much comment. Here it is of the greatest importance to have something like a settled principle applying to all Canada, but we have to ask ourselves whether under the head of "civil rights" in section 92 it would not be at least competent to the province to pass some legislation stopping the workmen or employers as the case may be from asserting their "civil rights" in a limited part. If you come to the conclusion that that was the effect of the Act, then no matter how important its purpose it is a thing that could be done by the province, and if so, it could not be done under section 91 unless you could find in section 91 in a subject or head such as "trade or commerce" something that enabled you to do it. That is why it is important to find out what "trade and commerce" means at the outset.

MR. STUART BEVAN: With your Lordship's permission may I deal with the authorities first and refer to the evidence later on, or if it is relied upon by my learned friends, perhaps by way of reply?

VISCOUNT HALDANE: I think that will be the best way. We have looked at the evidence and know broadly what it is.

LORD ATKINSON: What will you begin with?

MR. STUART BEVAN: I can begin with *Russell v. The Queen* or *The Citizens' Insurance Company of Canada v. Parsons* which is in the same report.

VISCOUNT HALDANE: Which came first?



MR. STUART BEVAN: The *Citizens' Insurance Company of Canada v. Parsons* is in the 7th Appeal Cases at page 96.

VISCOUNT HALDANE: Then we will take that first.

LORD ATKINSON: You will not omit to deal with Lord Watson's judgment in 1896 Appeal Cases?

MR. STUART BEVAN: That is on my list, and I will deal with it. *The Citizens' Insurance Company v. Parsons* is of importance in my submission because it deals with the meaning of the words "regulation of trade and commerce". The particular passage is on page 112 of the report. The Board deals with the words "regulation of trade and commerce" on page 112.

VISCOUNT HALDANE: You had better read the head note at page 96, and then go to the judgments.

MR. STUART BEVAN: If your Lordship pleases. "Sections 91 and 92 of the British North America Act, 1867, must, in regard to the classes of subjects generally described in section 91, be read together, and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can, without entering more largely than is necessary upon an interpretation of the statute. Held that: In No. 13 of section 92, the words 'property and civil rights in the province' include rights arising from contract (which are not in express terms included under section 91) and are not limited to such rights only as flow from the law, e.g., the status of persons".

VISCOUNT HALDANE: I note that the words "civil rights" are to be read generally as including rights arising from contract.

MR. STUART BEVAN: Yes. "In No. 2 of section 91, the words 'regulation of trade and commerce' include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and, it may be, general regulation of trade affecting the whole Dominion; but do not include the regulation of the contracts of a particular business or trade such as the business of fire insurance in a single province and therefore do not conflict with the power of property and civil rights conferred by section 92, No. 13".

VISCOUNT HALDANE: Let us see what that means. The Dominion cannot touch the rights as to fire insurance in a single province.

MR. STUART BEVAN: Yes, fire insurance was the business touched by that particular legislation. The proposition is that it does not include the regulation of contracts of a particular business or trade. Now this Industrial Disputes Act is only directed to a particular class of business and trade, works of public utility, and many businesses and trades are outside the scope of the Act altogether, and strikes may take place in any other trade than those enumerated in the Industrial Disputes Act, and the Act has no application at all.

VISCOUNT HALDANE: Of course, there is no attempt here to regulate the civil rights of employment in a single province.

MR. STUART BEVAN: No; it is an attempt to regulate particular trades in all the provinces, the particular trades. What happened in fact, as is shown by the evidence in this case, is that there were sympathetic strikes which are relied upon by the respondents as creating a position of public emergency, but the sympathetic strike in many cases was in a trade to which the Industrial Disputes Act had no application at all.

VISCOUNT HALDANE: That would not matter if it was a general principle and it was desirable to regulate disputes all over Canada, and there was power to do it.

MR. STUART BEVAN: That is not what it endeavours to do; it is only industrial disputes in particular trades.

VISCOUNT HALDANE: Even if you take particular trades, as long as they are all over Canada it would not matter.

Mr. STUART BEVAN: They are all over Canada, but it is particular trades.

VISCOUNT HALDANE: Can you tell me this from memory? *Parsons'* case only decided that you could not affect fire insurance in a particular province, but suppose you attempted to regulate fire insurance all over Canada, was that the subject of the decision in the insurance case later?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: That you could not?

Mr. STUART BEVAN: Yes, that you could not.

VISCOUNT HALDANE: Very well. *Parsons* only took us so far?

Mr. STUART BEVAN: Yes. Then going back to the head note: "Consequently:—(Ontario) Act 39 Victoria, chapter 24, which deals with policies of insurance entered into or in force in the Province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts, is a valid Act; applicable to the contracts of all such insurers in Ontario, including corporations and companies, whatever may be their origin, whether incorporated by British authority or by foreign or colonial authority. Held, further, that the said Ontario Act is not inconsistent with Dominion Act 38 Victoria, chapter 20, which requires all insurance companies whether incorporated by foreign, dominion, or provincial authority to obtain a license, to be granted only upon compliance with the conditions prescribed by the Act."

VISCOUNT HALDANE: Does that remain law?

Mr. STUART BEVAN: That, as far as I have been able to discover, remains the law.

VISCOUNT HALDANE: That is to say, license?

Mr. STUART BEVAN: Yes. "Held, further, that according to the true construction of the Ontario Act, whatever may be the conditions sought to be imposed by insurance companies, no such condition shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act." I do not think I need trouble with that, that deals with the particular provisions of the particular Act.

Then the judgment of their Lordships begins on page 103 and was delivered by Sir Montague Smith. I do not think I need read anything before page 112, the second paragraph.

VISCOUNT HALDANE: Just one moment, I think you must look at page 108.

Mr. CLAUSON: Would your Lordships also look at page 107, it is a statement which your Lordships will find repeated in other cases, and it might be convenient just to take it?

Mr. STUART BEVAN: "The scheme of this legislation, as expressed in the first branch of section 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature" (*Reading down to the words*) "With the same object, apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of section 92."

VISCOUNT HALDANE: That is one of the statements of the Judicial Committee that they have overruled?

Mr. STUART BEVAN: Yes.



VISCOUNT HALDANE: It extends to the whole of the subjects in section 92?

Mr. STUART BEVAN: Yes. "Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that, in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject 'marriage and divorce,' contained in the enumeration of subjects in section 91; it is evident that solemnization of marriage would come within this general description; yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces."

VISCOUNT HALDANE: That has been decided in the *Marriage* case reported about 1913 Appeal Cases?

Mr. STUART BEVAN: Yes. "So: 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one."

VISCOUNT HALDANE: I rather think on that it has been held that the Dominion may tax directly as well as indirectly, while the province can only tax directly; it is concurrent power.

Mr. STUART BEVAN: Yes. "With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces" etc., etc. (*Reading down to the words*) "Section 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had done before, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws."

VISCOUNT HALDANE: Before you pass from the paragraph at the top, does that mean Quebec can have its laws altered as regards rights flowing from status?

Mr. STUART BEVAN: I do not so read it.

VISCOUNT HALDANE: I suppose not. I suppose property and civil rights, including rights flowing from status, are left wholly to section 92. What effect is given to section 94? Can you alter it as regards rights flowing from status? I should like to look at section 94.

Mr. STUART BEVAN: On page 110 about one-third from the bottom of the page in the last paragraph the effect of the section is given: "By that section the parliament of Canada is empowered to make provision for the uniformity of any laws relative to 'property and civil rights' in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in these three provinces, if the provincial legislatures choose to adopt the provisions so made. The province of Quebec is omitted from this section." So that he gives the effect of the section.

VISCOUNT HALDANE: Is that so? What I want to get at is, what it imports; it may make provision for the uniformity of any laws relative to "property and civil rights"; that must include rights following from contract.

Mr. STUART BEVAN: Yes, status too I should say.

VISCOUNT HALDANE: As regards Quebec. Quebec is not touched by this section at all?

Mr. STUART BEVAN: No.

VISCOUNT HALDANE: What I want to get at is what Sir Montague Smith meant by this: "If, however, the narrow construction of the words 'civil rights', contended for by the appellants were to prevail, the Dominion Parliament could, under its general power, legislate in regard to contracts in all and each of the provinces and as a consequence of this the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion Legislature." It must be under section 91. What does he mean? What provision in section 91 does he allude to, is it "trade and commerce?"

Mr. STUART BEVAN: I think "trade and commerce," because trade and commerce was one of the matters relied upon in this case.

VISCOUNT HALDANE: My difficulty is, he has not said so.

Mr. STUART BEVAN: I think it appears as one goes on. On page 112 he considers the meaning of "regulations of trade and commerce" upon which the Dominion was relying. I think it will appear so.

LORD DUNEDIN: I think you will find what Lord Haldane wants in the argument of Sir Farrer Herschell on page 101.

Mr. STUART BEVAN: Yes. "Section 94 omits Quebec from the uniformity of legislative concurrent power; compare sections 93 and 95. That throws light on the meaning of the expression in section 92, No. 13; which is to be construed in its narrower sense."

VISCOUNT HALDANE: He is referring to "trade and commerce" as covering the whole Dominion?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Excluding all rights except those following from status?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Where does he say that contract is included in section 91?

Mr. STUART BEVAN: May I just read it: "Section 94 omits Quebec from the uniformity of legislative concurrent power; compare sections 93 and 95. That throws light on the meaning of the expression in section 92, No. 13; which is to be construed in its narrower sense, and not so as to affect or cut down the exclusive control over trade, commerce, and contracts given to the Dominion Parliament.

VISCOUNT HALDANE: That means that "civil rights" cannot include trade and commerce and contracts?

Mr. STUART BEVAN: That is so. That must be limited to status.

VISCOUNT HALDANE: It is all an argument for the wide reading of "trade and commerce"?

Mr. STUART BEVAN: Yes.

LORD ATKINSON: He says: "Section 94 omits Quebec from the uniformity of legislative concurrent power; compare sections 93 and 95. That throws light on the meaning of the expression in section 92, No. 13; which is to be construed in its narrower sense, and not so as to affect or cut down the exclusive control over trade, commerce and contracts given to the Dominion Parliament. Contract, moreover, is not included in that chapter of the Civil Code which deals with civil rights."



MR. STUART BEVAN: Yes. Sir Montague Smith is dealing with that argument when he refers to section 94 on page 110 of the judgment, and he goes on on page 112 to deal with the words "regulation of trade and commerce."

VISCOUNT HALDANE: What does Sir Farrer Herschell mean to say about section 94? What does he say it covers? He has already said "trade and commerce" in section 91 covers everything. What is the use of section 94?

LORD DUNEDIN: He says section 94 throws light on the true meaning of section 94, No. 13, that is "civil rights." The point is whether "trade and commerce" so monopolise the whole subject as to cut down any question of civil rights in respect of "trade and commerce."

VISCOUNT HALDANE: What I want to get at is what he said that section 94 said?

MR. STUART BEVAN: Sir Farrer Herschell relied on section 94 as throwing light on the meaning of section 92, No. 13 "civil rights."

VISCOUNT HALDANE: How does it throw light?

MR. STUART BEVAN: If I may say so with great respect to the argument reported here, I do not think it did. If Sir Farrer Herschell was relying on section 91, the section the respondents rely upon here, it was unnecessary to invoke section 94 at all.

VISCOUNT HALDANE: That is what is troubling me.

MR. STUART BEVAN: The passage in the judgment which I think comes on page 112 expresses quite clearly the view taken as to the position.

VISCOUNT HALDANE: I think the meaning of it is this, that section 91 "regulation of trade and commerce" cannot have the wide meaning contended for by the appellants because if it had it would enable regulation of Quebec civil rights notwithstanding that Quebec is left out of section 94.

MR. STUART BEVAN: Yes, it may be that. May I read on, because I think the matter becomes plain from the judgment. I am reading at page 111, a little below the middle of the page: "The next question for consideration is whether, assuming the Ontario Act to relate to the subject of property and civil rights, its enactments and provisions come within any of the classes of subjects enumerated in section 91. The only one which the Appellants suggested as expressly including the subject of the Ontario Act is No. 2, 'the regulation of trade and commerce'. A question was raised which led to much discussion in the Courts below and this bar, viz., whether the business of insuring buildings against fire was a trade". I do not think I need read that passage, it was decided that it was. Then on page 112: "The words 'regulation of trade and commerce', in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades", etc., etc. (*Reading down to the words*) "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade". That is the passage I rely upon. That has been repeated and followed in many decisions that followed the *Citizens Insurance Company v. Parsons*.

VISCOUNT HALDANE: I have a note which says: "8 Appeal Cases, page 8".

MR. STUART BEVAN: I will send for it; I am told it is the *Attorney General v. Mercer*.

VISCOUNT HALDANE: That is the case about mineral rights.

MR. STUART BEVAN: I am told it is in Cameron at page 322.

VISCOUNT HALDANE: My reference is obviously wrong because it is a reference to an English appeal.

MR. STUART BEVAN: The case on page 8 is *Nobel's Explosives Company v. Jones*.

VISCOUNT HALDANE: It cannot be that.

MR. STUART BEVAN: It deals with the importation and transshipment of a patented article.

LORD DUNEDIN: I think you will find it is page 767.

VISCOUNT HALDANE: I cannot find anything that bears on this point.

MR. STUART BEVAN: My friend Mr. Lawrence will be good enough to look at the report and see if there is anything relevant to this particular matter.

LORD ATKINSON: "It was contended that all escheats really belonged to the province and it was decided that that was not so, that the casual benefit derived from escheats in the province went to the province under section 109".

VISCOUNT HALDANE: I do not think it has anything to do with it.

LORD ATKINSON: Lord Selborne gave the judgment.

LORD DUNEDIN: This is it: "At the date of passing the British North America Act, 1867, the revenue arising from all escheats to the Crown within the then province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although section 102 of the Act imposed upon the Dominion the charge of the general public revenue as then existing of the provinces; yet by section 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces". It was, so to speak, a competition between the Dominion and the province for the revenue arising from escheats to the Crown.

VISCOUNT HALDANE: I do not think it has much to do with this.

LORD DUNEDIN: No. It only comes in on those sections dealing with taxation; it is a commentary upon them.

LORD ATKINSON: They contended that the Dominion had the right to get these escheats in the name of the Crown in order to enable it to discharge the debts?

MR. STUART BEVAN: Yes. If I may go back to page 113 of the 7th Appeal Cases and read this passage about 10 lines down, it is the important part of this judgment in relation to my argument; I think I did read half of it: "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92." There are passages in later judgments which indicate that this sentence in the judgment of Sir Montague Smith has been read and followed: "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade". What follows is merely an instance.

LORD ATKINSON: Is that so: "such as the business of fire insurance in a single province".

MR. STUART BEVAN: I do not think, having regard to the way this is referred to in later judgments, the words "such as the business of fire insurance in a single province" really add anything to it; it was merely an example. The broad proposition is, that the authority to legislate for the regulation of trade and commerce does not comprehend the "power to regulate by legislation the contracts of a particular business or trade".



VISCOUNT HALDANE: You must be very careful about that; what the new Act purported to regulate was the contracts of a group of businesses, a number of businesses; it was not the particular business.

Mr. STUART BEVAN: Public utility businesses.

VISCOUNT HALDANE: And other things too, but it is very general.

Mr. STUART BEVAN: Yes, it includes a very small proportion of the businesses carried on in the provinces.

LORD ATKINSON: Do not the following words seem to indicate it was not by mistake that the words "in a single province" were put in; it says: "and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92."

Mr. STUART BEVAN: I shall have to invite your Lordship's attention to other passages dealing with "regulation of trade and commerce" in other judgments. I think the illustration given there was founded upon the facts of the particular case. Your Lordships will see in some of the later judgments this is referred to again and again: "having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion Parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this board" in other cases. Then I do not think there is anything further in that judgment on the question material to the present case. The rest of the judgment deals with the true construction of the Ontario Act, not with the question of general principle.

VISCOUNT HALDANE: He did say apparently that he thought the legislation to require all insurance companies to obtain licenses from the Dominion Minister was legitimate.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: He does not pronounce on it, but he says it is not inconsistent with the authority of the legislature of the province of Ontario to legislate in relation to the contracts which corporations may enter into in that province. I do not think there is anything else.

Mr. STUART BEVAN: No, I do not think there is anything further in that judgment. That judgment is valuable for the construction put upon the words.

VISCOUNT HALDANE: That is right, but in those days, in the days when Chief Justice Ritchie and Mr. Justice Taschereau sat in the Supreme Court, the tendency was to set up the Dominion authority and Mr. Justice Taschereau gave a judgment in that case on which Sir Montague Smith comments on page 116, and it might be worth while reading a few words of that.

Mr. STUART BEVAN: Yes: "Mr. Justice Taschereau, in the course of his vigorous judgment, seeks to place the plaintiff in the action against the Citizens Company in a dilemma," etc., etc. (reading down to the words) "so that the denial of one power involves the denial of the other."

VISCOUNT HALDANE: One sees what he means.

Mr. STUART BEVAN: Yes. There are two appeals and the construction of the particular statute is dealt with in the rest of the judgment.

Then in the same volume is the case of *Russell v. The Queen*, at page 829.

LORD ATKINSON: Was the result of that, that neither the Dominion Parliament nor the provincial legislature can interfere with the contracts of one particular industry?

Mr. STUART BEVAN: Certainly; that the Dominion Parliament cannot.

VISCOUNT HALDANE: The province can.

Mr. STUART BEVAN: The province could interfere, but the Dominion Parliament cannot.

LORD ATKINSON: If the province can, that must obviously be insuring companies within the province.

Mr. STUART BEVAN: Undoubtedly; your Lordship will remember the wording of section 92.

LORD ATKINSON: It must be so; they have no jurisdiction over anything outside.

Mr. STUART BEVAN: Quite so; I do not contend that for a moment. That is expressly limited by "property and civil rights within the province."

Now we get to *Russell v. The Queen*, which was an exceptional case and really stands alone. The Dominion legislation in that case was with regard to the sale of intoxicating liquors, and it was held that such legislation was within the competency of the Dominion Parliament.

VISCOUNT HALDANE: The Canadian Temperance Act, otherwise known as the Scott Act. That is so, is it not, Mr. Duncan?

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: It is sometimes called one way and sometimes the other.

Mr. DUNCAN: Yes, my Lord.

Mr. STUART BEVAN: *Russell v. The Queen* is at page 829 of the same volume: "Held, that the Canada Temperance Act, 1878, which in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors except in wholesale quantities or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, punishable by fine and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament. The objects and scope of the Act are general, viz., to promote temperance by means of a uniform law throughout the Dominion. They relate to the peace, order, and good government of Canada, and not to the class of subjects 'property and civil rights' ". That was the ground of the decision, and that has been recognized ever since.

VISCOUNT HALDANE: Look at the last sentence.

Mr. STUART BEVAN: "Provision for the special application of the Act to particular places does not alter its character as general legislation."

VISCOUNT HALDANE: That, I think, was somewhat dealt with by the decision in the McCarthy Act case.

Mr. STUART BEVAN: Yes, that is so. In that particular case the ground for the decision which really stands by itself is as expressed in the head note that the Act did not relate to property and civil rights at all, that it was dealing with drink which would fall into the same category as poisons and explosives and so forth, and it was necessary for the good government of the Dominion that this particular legislation should be passed.

VISCOUNT HALDANE: In fact, that temperance was in the general Canadian interest?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: And therefore the matter was outside the province.

LORD DUNEDIN: That the right to have a glass of beer was not a civil right.



VISCOUNT HALDANE: Yes, but of course it involved a great deal more than the right to have a glass of beer. We had better have the judgment. You had better begin at the middle of page 833.

MR. STUART BEVAN: "The preamble of the Act in question states that 'it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors.' The Act is divided into three parts. The first relates to 'proceedings for bringing the second part of this Act into force;' the second to 'prohibition of traffic in intoxicating liquors;' and the third to 'penalties and prosecutions for offences against the second part'" etc., etc. (reading down to the words) "subsection 2 provides that 'neither any license issued to any distiller or brewer' (and after enumerating other licenses), 'nor yet any other description of license whatever, shall in any wise avail to render legal any act done in violation of this section.'" I do not think I need read the particulars of the sections. The third part of the Act (section 100) provides for conviction and penalties. Then at the top of page 835: "The effect of the Act when brought into force in any county or town within the Dominion is, describing it generally, to prohibit the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors in violation of the prohibition and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment. It was in the first place contended, though not very strongly relied on, by the appellant's counsel, that, assuming Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of counties and cities. The short answer to this objection is that the Act does not delegate any legislative powers whatever." I think I may pass on to the last paragraph but one on that page: "The general question of the competency of the Dominion Parliament to pass the Act depends on the construction of the 91st and 92nd sections of the British North America Act, 1867, which are found in Part VI of the statute under the heading 'Distribution of Legislative Powers.'" Then section 91 is set out. Then just above the middle on page 836 his Lordship continues: "The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of sections 91 and 92, and their relation to each other, were fully considered and commented on by this board in the case of the *Citizens Insurance Company v. Parsons*," etc., etc. (reading down to the words) "if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada had not, by its general power 'to make laws for the peace, order, and good government of Canada,' full legislative authority to pass it." Therefore the vital question was: Did it fall within section 92? "Three classes of subjects enumerated in section 92 were referred to, under each of which, it was contended by the appellant's counsel, the present legislation fell," etc., etc. (reading down to the words) "The Act in question is not a fiscal law." Then unless your Lordship desires it I do not think I need deal with the part of the judgment that deals with clause 9; it does not seem to be relevant to the present case, and in that case no question of principle was laid down from which I think any assistance is to be got here.

MR. CLAUSON: At the top of page 838 there is a passage which is several times referred to in subsequent cases.

MR. STUART BEVAN: Yes, five lines from the top of page 838: "Suppose it were deemed to be necessary or expedient for the national safety, or for political reasons, to prohibit the sale of arms, or the carrying of arms, it could

not be contended that a Provincial Legislature would have authority, by virtue of subsection 9 (which alone is now under discussion), to pass any such law, nor, if the appellant's argument were to prevail, would the Dominion Parliament be competent to pass it, since such a law would interfere prejudicially with the revenue derived from licenses granted under the authority of the Provincial Legislature for the sale or the carrying of arms."

Mr. CLAUSON: Would you mind reading on?

Mr. STUART BEVAN: Certainly: "Their Lordships think that the right construction of the enactments does not lead to any such inconvenient consequence. It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under subsection 9, is not in itself legislation upon or within the subject of that subsection, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion".

LORD DUNEDIN: With all respect to Mr. Clauson I do not think that has anything to do with the question we have here. You must remember what they were at in this case was, they were first of all trying to argue it fell within one of the provisions under section 92. Really all the judgment comes to is this: they say we do not think it comes within section 92; one of the things in 92 they wanted to hang it on was the license thing. Therefore, what they actually decided there was, having found that it does not fall in anything in 92, they say it became unnecessary to say whether it fell under anything in 91 because the moment you are out of 92 then the general powers of the Dominion prevail. I hope I was not rude, but I really do not think that that bit has anything to do with what we have to consider.

Mr. CLAUSON: I suggest that sentence which my friend was beginning to read has been referred to in the aspect cases, something which from one aspect may be considered to come under section 92; that is the only reason I thought your Lordships would like to have the passage.

VISCOUNT HALDANE: They say the power to restrict by the power of imposing licenses is not a power to be used for prohibiting the wider thing, the use of arms.

Mr. STUART BEVAN: That is all.

LORD ATKINSON: Lord Watson points to that; the Province might exact a fee for giving a license for carrying arms, but the Dominion might pass legislation dealing with the possession of arms if likely to be used for seditious purposes.

VISCOUNT HALDANE: Yes.

Mr. STUART BEVAN: Now we go to the bottom of page 838: "Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects 'Property and Civil Rights'" etc. etc. (*Reading down to the words*) "What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety".

LORD ATKINSON: It occurs to me that it would be legitimate for the Dominion to pass an Act to say that petrol should not be stored within a certain distance of an inhabited house.

VISCOUNT HALDANE: Yes. This is the crucial ground of the decision.

Mr. STUART BEVAN: Yes. "That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law" etc. etc. (*Reading down to the words*) "Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded". Lord



Atkinson put that illustration last time. "Laws of this nature designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights", etc., etc. (*Reading down to the words*) "exclusively to the Parliament of Canada".

VISCOUNT HALDANE: That is the passage that has been the subject of so much comment. Where are you to stop, if that is right?

MR. STUART BEVAN: Yes. "It was said in the course of the judgment of this Board in the case of the *Citizens Insurance Co. of Canada v Parsons* that the two sections (91 and 92) must be read together, and the language of one interpreted, and, where necessary, modified by that of the other." etc. etc. (*Reading down to the words*) "It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to subsection 15 of section 92".

VISCOUNT HALDANE: Now you see what was not property and civil rights. You remember that is the ground on which the case has been put later, and the explanations given in the subsequent appeals. That merely means that it is within peace, order and good government of Canada and not cut down by anything in section 92.

MR. STUART BEVAN: That was outside section 92 altogether.

VISCOUNT HALDANE: Yes, but on the other hand, you remember what Sir Montague Smith says about "trade and commerce". Does he say it is within "trade and commerce"?

MR. STUART BEVAN: No. If your Lordship will look at the last page it says: "Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislature, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in section 91".

VISCOUNT HALDANE: They do not dissent, but they do not affirm it.

MR. STUART BEVAN: No, I had better read it: "In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges, who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, 'the regulation of trade and commerce', enumerated in that action, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada".

LORD DUNEDIN: It is very simple, as long as you do not get out of section 92 it does not matter whether it comes within the enumerated subjects in section 91 or the general peace, order and good government of 91.

VISCOUNT HALDANE: It may be within "trade and commerce" or within criminal law, but it is not necessary to decide it.

LORD DUNEDIN: It may be simply within peace, order and good government.

VISCOUNT HALDANE: That is what they say it is.

MR. STUART BEVAN: When I come to peace, order and good government, in dealing with some of the later decisions, my submission will be that if the legislation comes within 92 the interests of peace, order and good government law are not sufficient. If it comes within 92 the Dominion cannot justify legislation on the ground merely that it is in the interest of peace, order and good government; it is vital to my case that I am within 92.

VISCOUNT HALDANE: He does say, does not he, it is not within "property and civil rights"; he says so on page 838 in the bottom paragraph.

Mr. STUART BEVAN: He says: "Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects 'Property and Civil Rights'". The reason in this: "It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances".

VISCOUNT HALDANE: Now where is *Hodge v. The Queen*?

Mr. STUART BEVAN: In 9 Appeal Cases at page 117.

VISCOUNT HALDANE: Is there any other case in between?

Mr. STUART BEVAN: No.

VISCOUNT HALDANE: The important point in *Hodge v. The Queen* was this, they put a restriction on the sale of liquor. I think if I remember right no public house was to be made without low windows so that people in the street could see who was having a glass of beer at the counter. Those restrictions the committee held to be within the power of the provinces.

Mr. STUART BEVAN: Yes, that is so.

LORD ATKINSON: It was held that they could make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., and it was said that that does not interfere with the general regulation of trade or commerce but comes within numbers 8, 15 and 16 of section 92.

VISCOUNT HALDANE: The judgment in that case was delivered not by Sir Barnes Peacock as stated but by Lord FitzGerald.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: You might just read the head note.

Mr. STUART BEVAN: "Subjects which in one aspect and for one purpose fall within section 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within section 91. *Russell v. The Queen* (7 Appeal Cases, 829) explained and approved. Held, that 'The Liquor License Act of 1877, chapter 181, Revised Statutes of Ontario,' which in respect of sections 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with 'the general regulation of trade or commerce,' but comes within Nos. 8, 15 and 16, of section 92 of the Act of 1867, and is within the powers of the provincial legislature."

VISCOUNT HALDANE: There that, so far as it goes, avoids the question whether it was within "peace, order and good government" by reason of it being outside section 92; they said it is within section 92, and, therefore, not within "peace, order and good government."

LORD DUNEDIN: Personally I should have thought the rubric was put the wrong way round. *Russell v. The Queen* had already settled that liquor falls within section 91; then you say, following the *Citizens Insurance Company v. Parsons*, they said notwithstanding it falls within section 91 yet it may have a certain application under section 92. If writing that head note I should have reversed the sentence.

Mr. STUART BEVAN: Yes; that it was within section 91 was decided by *Russell v. The Queen*.

VISCOUNT HALDANE: Yes, that was decided by *Russell*, that it was within "peace, order and good government." That is all.

Mr. STUART BEVAN: Yes, and could only be so decided upon the view that it came within section 91 and was not within section 92 at all.

LORD DUNEDIN: Because, as they said, it was within 91 and not within 92, but it is really the *Citizens Insurance Company* all over again. Although you



may have a thing which in a general aspect is under 91, yet there may be what you may call sub-divisions of the aspect which would fall under 92.

VISCOUNT HALDANE: Yes, that is why they put in the two aspects. It was Lord FitzGerald who delivered this judgment.

MR. STUART BEVAN: Yes. May I just refer to the judgment which begins on page 121. I do not think I need read anything until the middle of page 128; I do not think anything earlier than that is directly relevant. "Their Lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act", etc. (*reading down to the words*) "The principle which that case and the case of the Citizens Insurance Company illustrate is, that subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91."

LORD DUNEDIN: I must apologize to the author of the head note, if he is alive, or to his executors if he is dead, but, none the less, I think, with deference, Lord FitzGerald was wrong in putting it in that way.

MR. STUART BEVAN: The judgment continues: "Their Lordships proceed now to consider the subject matter and legislative character of sections 4 and 5 of 'the Liquor License Act of 1877, chapter 181, Revised Statutes of Ontario,'" etc., etc. (*Reading to the words, page 131*) "As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted." I do not think there is anything further I need read, because it goes to another point.

VISCOUNT HALDANE: There is a sentence or two which. I think, you might read, on page 132. It does not bear on what we are immediately on, but on what we shall come to, the position of the Provincial Parliament under the statute. I mean the passage beginning: "When the British North America Act enacted."

MR. STUART BEVAN: If your Lordship pleases. "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

VISCOUNT HALDANE: You see what that means. It meant something less obvious in those days than it means now. It meant that a provincial Parliament, as set up under the British North America Act of 1867, is a co-ordinate party and a legally and constitutionally co-ordinate party with the Dominion. True it is that the Governor-General appoints the Lieutenant-Governor, but when the Lieutenant-Governor is appointed he is the direct representative of the Crown.

MR. STUART BEVAN: Yes. I ought perhaps to have read that passage.

Then, my Lords, the next case is the *Attorney General for Ontario v. The Attorney General for the Dominion*, in 1896, Appeal Cases, at page 348.

VISCOUNT HALDANE: That is a very important case.

MR. STUART BEVAN: Yes, the judgment of the Board was delivered by Lord Watson.

LORD DUNEDIN: You are leaving out two cases in 1894. No doubt those two cases are dealt with in the judgment which I gave, but, after all, they were the cases on which I founded my judgment.

MR. STUART BEVAN: I will refer to that.

VISCOUNT HALDANE: We had better see what is in those cases.

MR. STUART BEVAN: I am sorry I had not brought them with me. One is *Tennant v. The Union Bank of Canada*, in 1894, Appeal Cases, at page 31, and the other is *The Attorney General of Ontario v. The Attorney General of Canada*.

VISCOUNT HALDANE: We will come to that later.

MR. STUART BEVAN: Those are the cases Lord Dunedin referred to.

LORD DUNEDIN: I referred to them because both the judgment of the Board, which I delivered, and which was concurred in, among other people, by Lord Macnaghten and Sir Arthur Wilson, went upon those two cases. I put it in rather broader words, but I was not laying down anything new.

VISCOUNT HALDANE: It only comes to this, that things which come within section 91 are things as to which section 91 prevails, although they are also within section 92.

LORD DUNEDIN: It comes to this, that, if both parties have legislated and they come into conflict, then the Dominion must get the best of it.

VISCOUNT HALDANE: I think that has been understood throughout.

MR. STUART BEVAN: In *Tennant v. The Union Bank of Canada*, the fourth paragraph of the head note is this: "The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in section 91, is of paramount authority even though it trenches upon the matters assigned to the provincial legislature by section 92."

VISCOUNT HALDANE: That is clear.

LORD DUNEDIN: I do not want you to cite these cases particularly, only if we are supposed to be having a chronological history of them these two cases come first.

MR. STUART BEVAN: I ought to have referred to them.

VISCOUNT HALDANE: They are on a principle that is not in dispute.

LORD DUNEDIN: I do not think you need read them, because they are really dealt with in the case I decided.

MR. STUART BEVAN: If your Lordship pleases. The other case, the *Attorney General of Ontario v. The Attorney General of Canada*, is reported in the same volume at page 189. I ought to say at once that my friend Mr. Geoffrey Lawrence and I have not provided ourselves with a complete list of all the decisions. We have dealt with trade and commerce as being a matter material to this appeal, and we have endeavoured to find all the decisions in which trade and commerce is discussed.

VISCOUNT HALDANE: I think we shall remember them when we come to them. What is the next case?

MR. STUART BEVAN: The one I am anxious to remind your Lordships of is Lord Watson's judgment in 1896 Appeal Cases, at page 348. The head note is this: "The general power of legislation conferred upon the Dominion Parliament by section 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in section 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion."



LORD ATKINSON: That is a very important statement.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: It is the body politic of the Dominion.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: That is not a bad expression, because that covers the case of war.

MR. STUART BEVAN: Yes, it covers emergency cases. It is really putting it very nearly as high as the emergency cases.

VISCOUNT HALDANE: Yes, it is very nearly.

MR. STUART BEVAN: "Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislation."

VISCOUNT HALDANE: That was a very important point in those days, because it was suggested that the Dominion could repeal, and this case says: No, because it is a purely co-ordinate party. Each party has no power to repeal a statute. All it can do is to say it is unlawful.

MR. STUART BEVAN: "Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 and 28 Victoria, chapter 18) was *ultra vires* the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order and good government of Canada; Russell v. The Queen followed; but not as regulating trade and commerce within section 91, subsection 2, of the Act of 1867; Citizen's Insurance Company v. Parsons distinguished and Municipal Corporation of Toronto v. Virgo followed. Held, also, that the local liquor prohibitions authorized by the Ontario Act (53 Victoria, chapter 56), section 18, are within the powers of the provincial legislature; but they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886."

VISCOUNT HALDANE: My recollection is that that was as to the distinction which is drawn between prohibition and licensing.

MR. STUART BEVAN: Prohibition and regulation. There are a number of questions, and the judgment refers to the seventh question as the most important one. May I read the seventh question, which is to be found at the bottom of page 349? "Has the Ontario Legislature jurisdiction to enact section 18 of Ontario Act, 53 Victoria, chapter 56, intituled 'An Act to improve the Liquor License Acts', as said section is explained by Ontario Act, 54 Victoria, chapter 46, intituled 'An Act respecting local option in the matter of liquor selling'?" Then the judgment, which was delivered by Lord Watson, begins on page 355.

VISCOUNT HALDANE: Then he states what the local Acts were which gave the power to license. Then he gives the substance of the Scott Act, that is the Canada Temperance Act of 1886. You had better read that, I think.

MR. STUART BEVAN: If your Lordship pleases. "Their Lordships think it expedient to deal, in the first instance, with the seventh question, because it raises a practical issue, to which the able arguments of counsel on both sides of the Bar were chiefly directed, and also because it involves considerations which have a material bearing upon the answers to be given to the other six questions submitted in this appeal. In order to appreciate the merits of the controversy, it is necessary to refer to certain laws for the restriction or suppression of the liquor traffic which were passed by the Legislature of the old province of Canada before the Union, or have since been enacted by the Parliament of the Dominion, and by the Legislature of Ontario respectively. At the time when the British

North America Act of 1867 came into operation, the statute book of the old province contained two sets of enactments applicable to Upper Canada, which, though differing in expression, were in substance very similar."

VISCOUNT HALDANE: Mr. Duncan will correct me if I am wrong, but I think that is after the great change following Lord Durham's Report, when Parliamentary institutions, representative institutions, were given to the United Province of Upper and Lower Canada, but with the legislature, which sat sometimes in Upper Canada and sometimes in Lower Canada. Then at a certain stage the Government, which was representative, was made responsible. That was before Quebec? I think it was still Upper and Lower Canada at that time?

MR. DUNCAN: Yes. The division was made in 1791 into Upper and Lower Canada, and each of them was given a legislature. In 1841 the two provinces were united after the rebellion. I think Lord Durham's Report had reference to what was ultimately passed as the British North America Act.

VISCOUNT HALDANE: No, that did not come until the Conference of 1864. Lord Durham's Report is much earlier than that. It was in the 30's, I think. I think you will find that Upper and Lower Canada were united by statute.

MR. DUNCAN: Yes, in 1841.

VISCOUNT HALDANE: Then there was a Parliament, but it sat sometimes at Toronto and sometimes at Montreal or Quebec, and it made laws which were different in Upper and Lower Canada. Then they were separated, and a legislature was assigned to each, and I think that was some time before the British North America Act.

MR. DUNCAN: I think not, my Lord.

VISCOUNT HALDANE: You are probably right. Anyhow, when the British North America Act was agreed on, they were defined, and a sharp distinction was made.

MR. DUNCAN: Yes.

VISCOUNT HALDANE: At this stage what Lord Watson says, no doubt rightly, is that the statute book of the old province contained two sets of enactments applicable to Upper Canada, that is to say, the Parliament of the United Provinces had passed laws relating to Ontario?

MR. DUNCAN: Yes.

VISCOUNT HALDANE: That is really what it means.

MR. DUNCAN: Yes, the statutes on their face show that it is applicable to the part of the province which formerly was the province of Upper Canada.

MR. STUART BEVAN: On page 356, at the top, Lord Watson says: "The most recent of these enactments were embodied in the Temperance Act, 1864 (27 and 28 Victoria, chapter 18), which conferred upon the municipal council of every county, town, township, or incorporated village, 'besides the powers at present conferred on it by law', power at any time to pass a by-law prohibiting the sale of intoxicating liquors, and the issue of licenses therefor, within the limits of the municipality", etc., etc. (Reading to the words, page 358) "and (3) as to every municipality having a municipal by-law which is included in the limits of, or has the same limits with, any county or city in which the second part of the Canada Temperance Act is brought into force before the repeal of the by-law, which by-law, in that event, is declared to be null and void."

VISCOUNT HALDANE: Let us pause for a moment to enable us to understand this. There was an Act in force in the province of Ontario under the old law which enabled local regulation, and even local prohibition to take effect. Then came the Scott Act, which was a Dominion Act, and then the Dominion appears to have repealed the provisions of the old Local Temperance Act of 1864 and also enacted prohibition. I want to get at how they had jurisdiction to do that.



I think it must have been in this way—Mr. Duncan will correct me if I am wrong in the matter—the British North America Act in effect, I think, says that the legislative power of the Parliament of Canada extends to all laws, which, if the province had been there after Confederation, as it was before, would have been within Dominion jurisdiction, and said, with regard to all others, that, if the province had dominion over those laws and had them in existence, then the Provincial legislature may deal with them as being merely provincial laws. There is a section in the British North America Act which, I think, is to that effect. If that is right, then what the Dominion did here was to say: We are acting in the case of these prohibition laws of the province in such a fashion that we are only exercising powers which we now possess over a subject matter which is now ours. We are not interfering with anything that is passed by the legislature of the new province. Is that right?

LORD DUNEDIN: I think in this case the Dominion had certainly expressly repealed the old provincial Act of 1864, and it was held that that was bad.

VISCOUNT HALDANE: They could not do that, because, partly at least, that was within provincial competence after Confederation. That is what I mean; they proposed to repeal everything that was exclusively within Dominion powers, but they left everything that was the other way. That is how I read what Lord Watson says.

MR. STUART BEVAN: Section 129 of the British North America Act deals with the continuance of existing laws: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective province, according to the authority of the Parliament or of that Legislature under this Act."

VISCOUNT HALDANE: That is what I thought.

MR. DUNCAN: In that connection there is a case which my learned friend has not referred to, which, I think, is quite important, *Bobie v. Temporalities Board*, in 1882, Appeal Cases, in which their Lordships held that an Act of the province of Canada before the Union, which affected Church property in both Quebec and Ontario, could not be repealed by the province of Quebec, because the Act was one Act applicable to both provinces, and, although it dealt with property and civil rights, the only legislature which could repeal it was the central legislature competent to deal with the matter from the point of view of both provinces.

VISCOUNT HALDANE: I remember that case very well.

MR. STUART BEVAN: Going back to the judgment of Lord Watson in 1896 Appeal Cases, at page 358 he says: "With the view of restoring to municipalities within the province whose powers were affected by that repeal the right to make by-laws which they had possessed under the law of the old province, the Legislature of Ontario passed section 18 of 53 Victoria, chapter 56, to which the seventh question in this case relates", etc., etc. (Reading to the words, page 361) "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures."

VISCOUNT HALDANE: That sentence of Lord Watson marked the watershed. Up to then the trend had been in favour of the Dominion under the guidance of the Supreme Court. Then Lord Watson set up a new tendency, and then it followed almost as much the other way. Whether it has now got more equalized I do not know.

MR. STUART BEVAN: I am going to refer your Lordships to the latest decisions, and I submit that the tendency is still the tendency that one finds in this judgment.

VISCOUNT HALDANE: You will have to demonstrate that with some illustrations on the minds of their Lordships sitting here. It is merely a question of tendency, and it cannot govern the decision in each particular case. Each case must be taken on its own merits.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: But undoubtedly in those days, and the days of Chief Justice Strong and Chief Justice Ritchie in the Supreme Court, most cases were decided upon the principle which Lord Watson denounces there.

MR. STUART BEVAN: Yes. "In construing the introductory enactments of section 91, with respect to matters other than those enumerated, which concern the peace, order and good government of Canada, it must be kept in view that section 94", etc., etc. (Reading to the words) "But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign state, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion."

VISCOUNT HALDANE: You observe what Lord Watson says: It is not within regulation of trade and commerce, and he not obscurely says that if he had had to decide the question whether it was within peace, order and good government, he would find it, having regard to the principles of construction laid down, a very difficult thing to say that *Russell v. The Queen* was wrong.

MR. STUART BEVAN: Yes, it was a different statute, of course, but the provisions had substantially been re-enacted in the statute which was before Lord Watson.

VISCOUNT HALDANE: If it was valid it was there occupying the field, and it put certain difficulties in the way, which he gets round.

MR. STUART BEVAN: He says: "The judgment of this Board in *Russell v. The Queen* has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament. In that case the controversy related to the validity of the Canada Temperance Act of 1878; and neither the Dominion nor the provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the Canadian Act within a district of New Brunswick, in which the prohibitory clauses of the Act of 1878 were in all material respects the same with those which are now embodied in the Canada Temperance Act of 1886; and the reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act."

VISCOUNT HALDANE: Which of those two Acts, Mr. Duncan, of 1878 and 1886, was called the Scott Act?

MR. DUNCAN: I am not sure; one I think was called the Dunkin Act; I am not sure which it was.

VISCOUNT HALDANE: I think it must have been the second one; I think the Scott Act was the earlier one.

MR. STUART BEVAN: "It therefore appears to them that the decision in *Russell v. Reg.* must be accepted as an authority to the extent to which it goes,



namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provisional area within the Dominion, must receive effect as valid enactments relating to the peace, order and good government of Canada. That point being settled by decision"—that is the Russell case—"it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the 'regulation of trade and commerce' within the meaning of No. 2 of section 91. If it were so, the Parliament of Canada would, under the exception from section 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of section 91"—that is the regulation of trade and commerce—"were discussed by this Board at some length in *Citizens Insurance Co. v. Parsons*, where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament" etc. (Reading to the words at page 367) "In like manner, the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation, does not appear to their Lordships to be within the authority of the Dominion Parliament." That, of course, deals with a different aspect of the matter, and I do not know that on the point I am now making my submission on it is directly relevant, but I will read it if your Lordships think it will be of any assistance.

VISCOUNT HALDANE: I do not think you need; it is in effect a decision that there is no power of repeal in either, but the Courts must say which statute is valid and how far.

Mr. STUART BEVAN: Yes, really I think I have read all Lord Watson's Judgment, except that on page 369 there is a passage.

VISCOUNT HALDANE: I was looking to see if there was anything on page 368.

Mr. STUART BEVAN: I do not think so.

VISCOUNT HALDANE: I think it may be worth while reading at the bottom of page 368.

Mr. STUART BEVAN: If your Lordship pleases. "It thus appears, that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at one and the same time."

VISCOUNT HALDANE: Does not that apply to the Ontario Act here and to the Lemieux Act? If they are both in operation at the same time, and there is inconsistency, they could not both be in opposition.

Mr. STUART BEVAN: Yes. "In the opinion of their Lordships the question of conflict between their provisions which arises in this case does not depend upon their identity or non-identity, but upon a feature which is common to both" etc. (Reading to the words page 370) "But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not and may never be in force. In a district which has by the votes of its electors"—This again, I think, all turns upon the special provisions of the Act. The option is to be exercised locally upon the votes to be taken as called for by the Act, and I do not think there is anything further I need read.

VISCOUNT HALDANE: Take the analogy here. It is said that in that case if the Dominion had put in operation by means of a vote of the electors this Scott Act, and if on the other hand the province had put its Temperance Act into force by a similar vote, there would have been a conflict.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: And one or other would have had to go.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Then he goes on to say if the Dominion were competent to pass the Canadian Temperance Act that would prevail.

Mr. STUART BEVAN: Undoubtedly.

VISCOUNT HALDANE: Have we got further than that here? He says there is no repugnancy between the two laws when the provisions of the Canadian Act have not been adopted by the local electors.

Mr. STUART BEVAN: It does not go further than that. Perhaps I had better read to the end.

VISCOUNT HALDANE: What he says is that the form of the Canadian Act does not debar the province from setting up and putting into operation a local Act so long as its own general Act does not come into operation itself.

Mr. STUART BEVAN: Perhaps I had better read to the end: "In a district which has by the votes of its electors rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll," etc. (Reading to the words) "that its provisions are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886." Unless your Lordships desire I will not read the part with regard to the other questions.

VISCOUNT HALDANE: No, I do not think that is material. This was a case of answering questions submitted by Order in Council to the Supreme Court.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: It was an appeal from their judgment.

Mr. STUART BEVAN: Yes. The principles laid down in that judgment, as your Lordships will see in a few moments, have been followed in the later judgments.

VISCOUNT HALDANE: Let us see what it decided: first of all, that the Canadian legislation could not have taken place under trade and commerce.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Nobody seems to have suggested criminal law here. It must have taken place under peace, order and good government as being of a nature that concerned the Dominion as a whole, but then they said whether it was such as to affect the body politic was a difficult and delicate question, which apparently they rejoiced in being relieved from having to decide affirmatively by what had been laid down in *Russell v. The Queen*.

Mr. STUART BEVAN: Yes; the next case I want to refer to is in 1907 Appeal Cases, at page 65, *The Grand Trunk Railway Co. of Canada v. Attorney General of Canada*. That is the case in which the Judgment of the Board was delivered by Lord Dunedin.

VISCOUNT HALDANE: That is the case which Lord Dunedin has referred to.

Mr. STUART BEVAN: Yes, it is a railway case.

VISCOUNT HALDANE: What do you say that decided?

Mr. STUART BEVAN: It is an application of what had already been laid down by Lord Watson. The particular legislation in this case was held to be valid as being legislation ancillary to through railway legislation, which was one of the matters falling to the Canadian Parliament under section 91, although it affected civil rights; it came within section 92; it also came within section 91, and therefore section 91 prevailed.

VISCOUNT HALDANE: It is only through railway legislation that comes under the Dominion.

Mr. STUART BEVAN: Yes; the head note is this: "Held, that the Dominion Parliament is competent to enact section 1 of Canadian statute 4 Edward 7,



chapter 31, which prohibits 'contracting out' on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants."

VISCOUNT HALDANE: The reporter has not taken the trouble to tell us what the point of the railway legislation was.

MR. STUART BEVAN: It was prohibiting contracting out on the part of Railway Companies from their liability to pay damages to their employees for personal injury.

VISCOUNT HALDANE: That was a Dominion Act?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: Did the Provincial Act say that they might?

MR. STUART BEVAN: I do not think as far as I remember the case that there was in fact any Provincial legislation upon the matter at all.

VISCOUNT HALDANE: Then what was the point?

MR. STUART BEVAN: The point was, this was an interference with civil rights.

VISCOUNT HALDANE: That the employees were people within the provinces.

MR. STUART BEVAN: Yes, it was an interference with civil rights within the province, and the board held: Yes, that is perfectly true, and you come within section 92 on that ground, but the matter is also within section 91, and therefore section 91 prevails, although the legislation affects the civil rights within the province.

VISCOUNT HALDANE: The material parts seem to be in the middle of page 68.

MR. STUART BEVAN: Yes, may I begin at page 67: "The question in this appeal is as to the competency of the Dominion Parliament to enact the provisions contained in section 1 of 4 Edward VII, c. 31, of the Statutes of Canada," etc. (Reading to the words page 68) "As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers."—and I most respectfully submit an interference with contracts of employment between masters and men—"In the factum of the appellants it is (inter alia) set forth that the law in question might 'prove very injurious to the proper maintenance and operation of the railway. It would tend to negligence on the part of the employees, and other results of an injurious character to the public service and the safety of the travelling public would necessarily result from such a far reaching statute.' This argument is really conclusive against the appellants. Of the merits of the policy their Lordships cannot be judges. But if the appellants' factum properly describes its scope, then it is indeed plain that it is properly ancillary to through railway legislation." I rely, of course, upon that as I do upon the earlier judgment of Lord Watson.

Then, my Lords, there is another case of the *Attorney General of Manitoba v. Manitoba License Holders' Association* reported in 1902 Appeal Cases at page 73.

VISCOUNT HALDANE: This was Lord Macnaghten's judgment in which he upheld the Provincial Act.

MR. STUART BEVAN: Yes, it does not deal with trade and commerce.

VISCOUNT HALDANE: Does it add anything at all?

MR. STUART BEVAN: I do not think it does; it follows Lord Watson's judgment in 1906.

VISCOUNT HALDANE: It is said that the province had power to pass the legislation which was virtually prohibitive legislation in the province; it was

legislation of a restrictive kind going so far that it virtually came to prohibition of the retail though not of the wholesale trade, and it was also decided that although it might go outside the province, that was no objection to an Act which was within the Province's powers.

LORD DUNEDIN: There had been no Dominion legislation?

Mr. STUART BEVAN: No.

Mr. DUNCAN: Lord Macnaghten expressed the view that that case fell rather under No. 16 than under No. 13.

VISCOUNT HALDANE: No. 16 is local matters within the province?

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: I do not think it adds to the matter.

Mr. STUART BEVAN: I do not think it does.

LORD ATKINSON: He held it was, although it might interfere with the business operations outside the province.

Mr. STUART BEVAN: Yes.

LORD DUNEDIN: I do not quite understand your remark that that case in which I gave judgment in 1906 helps you; I am not saying it does not help you, but I do not see how it helps you.

Mr. STUART BEVAN: Your Lordship held that the legislation came both within section 91 and section 92, and the application of the principle which was laid down in the very early cases, in that case section 91 prevails.

VISCOUNT HALDANE: It really did not want any decision for that: section 91 says that railway matters are within the competency of the Dominion Parliament, and Lord Dunedin said this would extend to the arrangements which a railway company makes with its servants.

Mr. STUART BEVAN: Yes.

LORD DUNEDIN: How does it help you; I do not think it does. You want to say that the Dominion legislation is bad?

Mr. STUART BEVAN: If I said it helps me that is not a very happy phrase; it does not either help me or my learned friend.

VISCOUNT HALDANE: You read it for our edification?

Mr. STUART BEVAN: I read it because it is a comparatively recent decision.

LORD DUNEDIN: I do not think it did anything except that it put in rather shorter form what had been decided before.

VISCOUNT HALDANE: It is a very sound statement of the existing law. You are getting on to the narrow part of the path now. It is plain from reading *The Attorney General for Ontario v. The Attorney General for the Dominion* that the Board at any rate did not lay much stress either upon trade and commerce or upon criminal law.

Mr. STUART BEVAN: No.

VISCOUNT HALDANE: Lord Watson intimated not obscurely that there were difficulties, but that he was relieved from considering the Russell case. The other side have to show, not you, that this touches the body politic in such a sense and what we want now is such authority as you can give us on the meaning of that word.

LORD DUNEDIN: It is really a case of: Not guilty but do not do it again.

Mr. STUART BEVAN: I get most assistance from what I may call the profiteering case, the Board of Commerce case.

VISCOUNT HALDANE: We shall have to come to that, and we shall have to come to the Manitoba case.



Mr. STUART BEVAN: Yes. I am going to make the submission that the interests of the body politic being affected, and the cases where public emergencies or public dangers have been considered really fall under the same head.

VISCOUNT HALDANE: You are going to say they are the same thing.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Before we come to these cases we had better for a moment consider at large the kind of inquiry that arises. You must remember that the provinces are co-ordinate with the Dominion except in all matters which fall within their scope legislatively, that is to say, they are in a sense like independent kingdoms with very little Dominion control over them. It is open to them in every case to pass legislation restricting strikes as being restrictions of civil rights, and it is open to all of them to pass the same legislation, or to pass legislation for the same object in different forms.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: And they have done that with regard to companies with provincial objects. The legislation is different in the different provinces. But is there anything inherent in this subject which makes it necessary in the interests of the body politic, to use a short phrase, that there should be identical legislation passed for the whole of Canada?

Mr. STUART BEVAN: I submit not.

VISCOUNT HALDANE: The other side say yes.

Mr. STUART BEVAN: Yes, my Lord, looking at the evidence, which if necessary I shall ask your Lordships to consider, there is nothing in my submission which makes it a Dominion matter.

VISCOUNT HALDANE: I am not sure that I agree with you about that. I have looked at the evidence. Undoubtedly a trade union to-day is not the local thing which it used to be. It may be national or it may be international. That may not be a reason for dealing with it with the broad power of the Dominion, but it is a reason which must be taken into account as explaining the Lemieux Act.

LORD ATKINSON: Supposing there was an Act in each province somewhat similar to this, would it be competent for the Dominion to as it were combine all those and pass one Act for the whole country being practically what was done in each province?

Mr. STUART BEVAN: I do not think it would be competent.

LORD ATKINSON: That would seem to be unifying the legislation.

VISCOUNT HALDANE: Yes, but where is their power: the provinces are absolutely independent.

LORD ATKINSON: You would dispute that, Mr. Bevan?

Mr. STUART BEVAN: I should dispute that, my Lord.

LORD SALVESSEN: Before unifying it would involve repeal, and that is beyond the power of the Dominion.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: You would have to find power to legislate. No doubt if a great national emergency came, if the trade unions were to go in rebellion against the State, it would be competent for Canada to pass a general Act putting an end to the trade unions by some such means, but that would be new legislation.

Mr. STUART BEVAN: I should not contest that if industrially there was such a state of affairs in the Dominion, that the safety of the Dominion was threatened unless the industrial situation was dealt with vigorously and promptly, that the Dominion has power in such a case as that.

LORD DUNEDIN: Supposing there was a universal strike against supplying provisions to anybody, so that the whole country would be starved?

Mr. STUART BEVAN: Yes, war, famine, insurrection, all those matters; but the Act must be passed as and when the occasion arose. If there is the situation which threatened, and unless the Act is passed, then and there, and there are some appropriate or effective means of dealing with the situation—

LORD DUNEDIN: That would be just as much an emergency as the Great War.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: After the adjournment do you think the best plan would be to go straight on, or to take the Pulp case; perhaps that would be safer, because that is the negative.

Mr. STUART BEVAN: Yes, my Lord.

(Adjourned for a short time.)

VISCOUNT HALDANE: Now we will go to the Pulp case.

Mr. STUART BEVAN: Yes, my Lord, that is in 1923 Appeal Cases at page 695, it is the *Fort Frances Pulp & Power Company Ltd. v. The Manitoba Free Press Company Ltd. and others*. The question there was as to the validity of Dominion War Measures legislation, emergency legislation controlling throughout Canada the supply of paper for printing, and incidentally the question arose, whatever the question might be during the war with regard to such legislation, whether the continuance of the enforcement of the provisions of that legislation after the war could be supported on the ground of emergency.

VISCOUNT HALDANE: We said it was a question for the Government and we could not judge of it, that it was impossible to form any judgment of what considerations had to weigh with the Government, not only that but the terms of the proclamation and whether this legislation endured till the Government said it was no longer necessary. There is a case from the United States Supreme Court of *Hamilton vs. Kentucky Distilleries Co.*, which is reported in 251 United States Reports at page 146. I know that it is at the House of Lords Library and I think we should have it.

LORD DUNEDIN: You were saying a little time ago that you thought that what I might call the exceptional cases, of which this is the first, were really in the same category as the cases that Lord Watson says may be local questions and grow so large as to become an Imperial question.

Mr. STUART BEVAN: Yes.

LORD DUNEDIN: I am not satisfied you are right in saying those relate to different instances of the same thing; I do not say I have made up my mind, but my impression is that they are different things.

Mr. STUART BEVAN: I will deal with them on both views, that they are the same, and if I am wrong on that, that they are different; very much the same considerations up to a point will apply to both. It may be that in what I may call the national emergency cases one must go a little further than in the other class.

VISCOUNT HALDANE: It cannot arise here where Parliament is supreme and where at the beginning of war it always passes emergency legislation. It did arise in the United States and was decided to arise in Canada. In the United States, at the time of the Civil War, there was a decision of the Supreme Court that these things could not be done, particularly with regard to proclamations freeing slaves and passing legislation for even the non-slave States that slaves coming there should be free, and in the Scott case the Chief Justice decided that the Federal Government had no power, but the President swept all that



away and said: We are in the middle of war, we are fighting for the life of the United States, and whatever may be the restrictions on the Constitution which has no reserved powers in the Federal Government, this power must be applied, and public opinion supported it. I have got here now the recent case as to the late war, and we will see if it throws any light on it when we come to it.

Mr. STUART BEVAN: That is referred to by your Lordship in the Fort Frances case. The Fort Frances case, if I may read the head note, says this: "Under sections 91 and 92 of the British North America Act, 1867, the Dominion Parliament has an implied power, for the safety of the Dominion as a whole, to deal with a sufficiently great emergency, such as that arising from war, although in so doing it trenches upon property and civil rights in the provinces, from which subjects it is excluded in normal circumstances. The enumeration in section 92 is not repealed in such an emergency, but a new aspect of the business of Government emerges. The Dominion Government, which in its Parliament represents the people of Canada as a whole, must be deemed to be left with considerable freedom to judge whether a sufficiently great emergency exists to justify an exercise of the power:—Held, accordingly, that the Canadian War Measures Act, 1914, and Orders in Council made thereunder during the war for controlling throughout Canada the supply of newsprint paper by manufacturers and its price, also a Dominion Act passed after the cessation of hostilities for continuing the control until the proclamation of peace, with power to conclude matters then pending, were *ultra vires*." The Judgment of the Appellate Division was affirmed on a different ground.

VISCOUNT HALDANE: You observe that all this legislation arose under the Canadian War Measures Act of 1914, which was at the beginning of the war, and executive powers conferred by that Act were deemed to have continued as long as the Government needed them.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: There was a fear that there might arise dissatisfaction and consequently the Press must be controlled and accordingly the Paper Control was set in operation.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: You had better perhaps read the Judgment.

Mr. STUART BEVAN: The Judgment of your Lordships' Board was delivered by Lord Haldane on page 698. Does your Lordship desire me to read the statement as to the legislation and proclamations and orders?

VISCOUNT HALDANE: If you can do it shortly.

Mr. STUART BEVAN: The head note sets out what the position was. There was the Canada War Measures Act of 1914 and certain Orders in Council were made under that Statute regulating the supply of paper.

VISCOUNT HALDANE: Under that not only the price was controlled but the supply of paper.

Mr. STUART BEVAN: The quantities they could have.

VISCOUNT HALDANE: To keep a hand over newspapers.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: That was done originally soon after 1914 and it went on. I do not think you need read all this through.

Mr. STUART BEVAN: I will go to page 703 unless your Lordships desire otherwise.

VISCOUNT HALDANE: I think that is right.

Mr. STUART BEVAN: "The question, therefore, becomes one of constitutional law, as to whether the procedure thus established had a valid basis. This

depends, in the first place, on whether the two statutes already quoted were *intra vires* of the Dominion Parliament" &c. (*reading down to the words*) "But questions may arise by reason of the special circumstances of the national emergency which concern is nothing short of the peace, order and good government of Canada as whole." That is why I ventured to link the two things together in view of the passage in the judgment in the Fort Frances case. Then: "The overriding powers enumerated in section 91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects assigned otherwise exclusively to the provinces."

VISCOUNT HALDANE: With regard to all the rights and powers enumerated in section 91, that must refer to an extension of the normal meaning of those things.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Of course the general overriding power did apply?

Mr. STUART BEVAN: Yes. "It may be, for example, impossible to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only the situation created by the emergency places within the competency of the Dominion Parliament. It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within section 91, because in their fullness they extend beyond what section 92 can really cover."

LORD WRENBURY: They are pregnant words are they not?

Mr. STUART BEVAN: Yes.

LORD WRENBURY: Those words contain a principle.

Mr. STUART BEVAN: Yes. May I read them again: "It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with: and these relations, which affect Canada as an entirety, fall within section 91 because in their fullness they extend beyond what section 92 can really cover." Then the judgment goes on: "The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the state as a whole" &c. (*reading down to the words*) "The operation of the scheme of interpretation is all the more to be looked for in a constitution such as that established by the British North America Act, where the residuary powers are given to the Dominion Central Government, and the preamble of the statute declares the intention to be that the Dominion should have a constitution similar in principle to that of the United Kingdom."

VISCOUNT HALDANE: No doubt Lord Dunedin will tell us, because he was in the case, in the De Keyser case all that was decided was this, that the prerogative power of the Crown had originally existed, that was not continued, but it was said when you have passed legislation dealing with the same subject matter then the once paramount power is superseded by legislative regulations. That does not touch this. What is said here is that the prerogative power is retained for the Dominion Central Parliament in a sufficient emergency, but it must be a really sufficient emergency.

Mr. STUART BEVAN: Yes. "Their Lordships, therefore, entertain no doubt that however the wording of sections 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the provinces of Canada" &c., (*reading down to the words*) "In saying what is almost obvious, their lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton v. Kentucky Distilleries Co.*"



VISCOUNT HALDANE: Need you read further?

Mr. STUART BEVAN: No. I am sorry I have not the American report.

VISCOUNT HALDANE: I have it now and I will tell you what is in it.

LORD DUNEDIN: I think it is evident that it would be easier to arrive at the result, against you, you know, in Canada than it would in America because in America the Supreme States came together and they gave the United States such power as they thought fit to by the original constituting instrument, but in Canada it began from the other end.

Mr. STUART BEVAN: Yes, it did.

VISCOUNT HALDANE: It was a delegation.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: You may say this, that in Canada the provinces, which were quite separate from each other for the most part when the Constitution was founded, came together, and at their conference they handed over the problem of agreeing as to general lines to Parliament to solve for them; Parliament gave it back, but it was really something quite different. I have here the American case of Hamilton and I will tell you what it is. This is the head note: 1. "Although the United States lacks the police power, this being reserved to the States, it is none the less true that when the United States exerts any of the powers conferred upon it by the Federal Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by the state of its police power, or that it may tend to accomplish a similar purpose." Then 2. "The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations; but the 5th amendment to the Federal Constitution imposes, in this respect, no greater limitation upon the national power than does the 14th amendment upon state power." Then No. 3: "If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th amendment without making compensation, then the United States may, for a permitted purpose, impose a like restriction consistently with the 5th amendment without making compensation." Then No. 4: "Private property was not taken for public purposes without compensation, contrary to United States Constitution, 5th Amendment, by the enactment by Congress, in the exercise of the war power, of the provisions of the War-time Prohibition Act of November 21, 1918, fixing a period of seven months and nine days from its passage, during which distilled spirits might be disposed of free from any restriction imposed by the Federal government, and thereafter permitting, until the end of the war and the termination of demobilization, an unrestricted sale for export, and, within the United States, sales for other than beverage purposes." Then No. 5: "Assuming that the implied power of Congress to enact such a measure as the War-time Prohibition Act of November 21, 1918, must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it, the power is not limited to victories in the field and the dispersion of the hostile forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." Then No. 6: "The Federal Supreme Court may not, in passing upon the validity of a Federal statute, inquire into the motives of Congress, nor may it inquire into the wisdom of the legislation, nor may it pass upon the necessity for the exercise of a power possessed." Then No. 7: "It requires a clear case to justify a court in declaring that a Federal Statute adopted to increase war efficiency has ceased to be valid, on

the theory that the war emergency has passed and that the power of Congress no longer continues." Then No. 8: "The War-time Prohibition Act of November 21, 1918, cannot be said to have ceased to be valid prior to the limitation therein fixed, viz., 'the conclusion of the present war and thereafter until the termination of demobilization,' on the theory that the war emergency has passed, where the Treaty of Peace has not yet been concluded, the railways are still under national control by virtue of the war powers, other war activities have not been brought to a close, and it cannot even be said that the man power of the nation has been restored to a peace footing." Then No. 9: "The existing restriction on the sale of distilled spirits for beverage purposes, imposed by the War-time Prohibition Act of November 21, 1918, was not impliedly removed by the adoption of the 18th Amendment to the Federal Constitution, which, in express terms, postponed the effective date of the prohibition of the liquor traffic thereby imposed, until one year after ratification." Then No. 10: "The war with Germany cannot be said to have been concluded within the meaning of the War-time Prohibition Act of November 21, 1918, merely by reason of the actual termination of activities." Then No. 11: "The provision of the War-time Prohibition Act of November 21, 1918, that it shall not cease to be operative until the 'conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the president,' is not satisfied by passing references in various messages and proclamations of the president to the war as ended, and to demobilization as accomplished, nor by newspaper interviews with high officers of the army, or with officials of the War Department." That is the substance of the decision. The judgment was given by Mr. Justice Brandeis and I think this may be read: "That the United States lacks the police power and that this was reserved to the states by the 10th Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose." Then he quotes a vast number of authorities. "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations"—then he quotes more authorities—"If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the 5th Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

I think I need not go into the details because the head note which I have read goes into the question of when the war came to an end and so on. You see it is plain that it was thought that, in the Constitution of the United States, although theoretical police power was with the States, there was power which was inherent and power which interfered with State rights and property and so on.

MR. STUART BEVAN: I am indebted to your Lordship. The purport of it was, I think, to be gathered from the reference to it in the *Fort Frances* case. May I make one or two observations on the *Fort Frances* case? Your Lordship, in the Judgment of the Board, does not distinguish between the legislation for peace, order and good government as referred to in the *Russell* case, and legislation which the emergency of the situation calls for for the purposes of peace, order and good government. Your Lordship deals with it under that head.

LORD ATKINSON: That is for peace, order and good government in the new condition of things.



MR. STUART BEVAN: Yes, my Lord, in the new condition of things, but the position was not dealt with as it might have been on one view of the *Russell case*, which, respectfully, I submit, would be the wrong view; it was not dealt with upon an independent ground; apart altogether from the emergency of the situation produced by the war, this matter of paper conservation and regulation and prices has passed out of the domain of local and provincial affairs and has become a question of Dominion importance. In one view it would have been open to the respondents, I think it was there, who were supporting the decision of the Supreme Court, to have based their argument upon the two grounds, first of all national emergency, the exceptional conditions, war insurrection, or whatever it may be, and, secondly, apart from that altogether, we may be wrong about that, but this particular topic for legislation has passed out of the domain of local interest and has passed into a far wider question, a Dominion wide question. Now your Lordship dealt with the two matters as if the bigger included the less, and, if I may respectfully submit it, that is in fact the position, and in law is the position, and it seems to me to have been recognized by counsel for the respondents there, because, in the argument which is set out on page 698, your Lordship sees precisely how it was put. Mr. Tilly was for the respondents and he says: "Having regard to the special circumstances existing in 1914 the Act of that year and the Orders were valid. The paper mills were scattered through the provinces, and there were newspaper publishers in all the provinces. The control of the trade, which the evidence shows was necessary, could only be effected by Dominion legislation. Control of prices was a necessary part of the control of the trade. Sections 91 and 92 must be read so as to enable legislation necessary in existing circumstances to be passed by the Dominion"—those being the circumstances of emergency—"if it cannot be passed effectively by the provinces. The *Board of Commerce case* recognizes that exceptional circumstances, such as those arising from war, may take a subject out of the enumeration in section 92 and into the general words of section 91. The Act of 1919 was passed by the Dominion to wind up transactions arising under emergency legislation which it had validly passed." Then I need not trouble with the rest. It is upon another point. In my submission, the whole case was argued and proceeded and was decided upon one ground alone, emergency.

LORD ATKINSON: That was emergency of war, and the results of war, but may there not be, if I may use the expression, civil emergency, for instance, plague?

MR. STUART BEVAN: Yes.

LORD ATKINSON: It may extend, may it not, so far that it would justify the Dominion in passing Acts to deal with it, even although they may entrench upon the civil right of the province.

MR. STUART BEVAN: I should not dispute that for a moment. I should concede that in the case of emergency, peril of the interests of the Dominion threatened by a national strike, possibly accompanied by violence or something of that kind; in the case of national peril, Dominion legislation would be perfectly appropriate and would be *intra vires*, but that occasion has yet to arise, and when it does arise the position will be considered, but it is no part of my argument to-day that one must rule out of consideration in this matter the results of any labour trouble in the Dominion producing, in fact, a state of national peril, in which circumstances the Dominion Parliament would have to intervene in the interests of the Dominion.

LORD ATKINSON: They might strike and make a certain railway communication impossible, such as on the Canadian Pacific Railway, or some other railway, and that would reduce very soon the population to starvation.

MR. STUART BEVAN: That would be emergency, but one must wait for the emergency to happen, or to be threatened or imminent.

VISCOUNT HALDANE: Take Lord Atkinson's illustration and develop it. The Canadian Pacific runs right through Canada. Supposing in one province the railwaymen struck, that might reduce the whole trunk line to impotence and might mean starvation in Canada. Would that be such a national emergency, or must you leave it outside?

Mr. STUART BEVAN: That would of course fall within sections 91 and 92, and section 91 would prevail; the particular case which Lord Atkinson puts would.

VISCOUNT HALDANE: Is there any other case that we could find of the same kind?

LORD WRENBURY: The emergency point is this, as I understand it, if the circumstances are such as that, you could infer that the Dominion Parliament ought to have control of it for the protection of those who are in the separate provinces of Canada. May not that principle also extend to any case in which the subject is one of such magnitude, or it may become by degrees of such magnitude that it is rather for the Dominion than the province to legislate, that is the true principle; I am struggling to get at some principle.

Mr. STUART BEVAN: I should submit, not because it is open to the Provincial Legislatures to deal with the matter themselves, and the Provincial Legislatures dealing with the matter themselves, if they deal with it effectively, the question will never become one of such magnitude at all.

LORD ATKINSON: You would admit, if the network of trades unions of railway servants extended over several provinces, that at all events if there was an outbreak, or if there was a strike, they would be entitled to pass a law dealing with the strike?

Mr. STUART BEVAN: Yes.

LORD ATKINSON: But you say not in anticipation?

Mr. STUART BEVAN: I say not in anticipation.

LORD ATKINSON: They cannot take precautions for a possible future strike, but they may do it for the purpose of dealing with an existing strike.

VISCOUNT HALDANE: In an acute emergency?

LORD ATKINSON: That depends; the possible recurrence of the strike may be an emergency if it is threatening.

Mr. STUART BEVAN: It may well be that it is competent to the Dominion Parliament to legislate with regard to strikes, but that the Statute shall not come into operation unless an Order in Council, or something of that kind, is passed, the Order in Council to be passed in the case of a national emergency for the purpose of bringing the provisions of the particular statute relating to strikes into immediate force.

LORD ATKINSON: Take the question of a statute such as this, which does not punish the striker in any way, but establishes the system of conciliation, and only exercises compulsory powers to make persons attend the sitting of that committee and produce their books, and not to take any action pending the decision of the Board of Conciliation and Investigation.

Mr. STUART BEVAN: That is an interference with civil rights which, in my submission, cannot be justified on any ground other than emergency.

LORD ATKINSON: No doubt it is consequential interference with civil rights, but it is not the direct object of the statute, it is consequential interference so that they will not permit the man to leave the service till a certain time, and you can insist upon a man producing his books if he declines to produce them and give your agent authority to enter his premises and search, and it may be a very objectionable thing. That is the coercion necessary to make the Conciliation Act work and not the object of it.



MR. STUART BEVAN: I must concede that at once, it is not the object of it; with no particular purpose in view, it is not an attempt to interfere with civil rights, but it is an attempt to arrive at a settlement of industrial disputes by conciliation, which involves this interference with rights.

LORD ATKINSON: I quite agree.

MR. STUART BEVAN: I cannot put it higher than that. In conceivable circumstances, such legislation might well be *intra vires* the Dominion.

LORD ATKINSON: Following the example of the emergency case, are not you entitled to say the government of the country is the best judge whether this legislation is now needed, or must we wait for an outbreak?

MR. STUART BEVAN: In my submission not. When one looks at the nature of these provisions, at the nature of the remedy which is provided in these provisions, reading the statute, one is left, if I may put it in this way, with a feeling: Well, if this matter is of such Dominion wide interest, and the matter in respect of which the Dominion Parliament is legislating is one of such emergency, all one can say is that the remedy proposed or provided by the Statute is wholly inadequate to the emergency, because what does it all come to? Nothing at all. It all depends upon whether the parties consent to arbitration. If they do not, all that can happen is that the Board of Conciliation will meet and endeavour to bring the parties together; if it fails, the parties will revert to the position they occupied before the Board of Conciliation was appointed, and time will be lost, and I suppose the feeling between employer and employee may be very much inflamed by the delay and the attempts that have been made to bring them together, and the position will be worse than before, and there is no machinery provided by the Act for putting an end to the industrial dispute.

LORD ATKINSON: Conciliation is quite a desirable thing, but it may interfere with civil rights so far as it is necessary to carry it out.

MR. STUART BEVAN: All these attempts to settle industrial disputes, or induce the parties to industrial disputes to settle them for themselves, must depend upon local conditions, local feeling, the nature of the employment and so forth, and one would have thought that they were matters essentially for the provincial governments to deal with, who are in touch with local feeling.

LORD WRENBURY: Supposing the legislation was an endeavour to deal with an organized system of seditious propaganda being used in Ontario and also elsewhere in Canada, a state of things not growing up as an emergency suddenly, but developing by degrees, and it was necessary to interfere with it, would not that be such a subject matter as the Dominion could properly deal with.

MR. STUART BEVAN: That might fall under "Criminal Law" or call for an amendment of the Criminal Law.

LORD WRENBURY: I was thinking of a thing that develops by degrees, it is not an emergency.

MR. STUART BEVAN: Sedition would be directly against the government.

LORD ATKINSON: Take a national strike that would paralyze everybody.

MR. STUART BEVAN: In that case I should concede, with a national strike imminent, it well might be held to be *intra vires* the Dominion Parliament to legislate to prevent it, or ameliorate the conditions arising out of the strike, but that is not the case here.

LORD WRENBURY: It is whether it is sudden; is there any particular feature in its being sudden, an emergency, or danger of a strike?

MR. STUART BEVAN: In my submission, yes, because in such a case as this, the interests of civil rights and property must be subordinated to the national interest. This piece of legislation which we attack here makes a wide invasion of civil rights without the justification afforded by emergency, and it applies

in the case of strikes which have no prospect at all of provoking sympathetic strikes elsewhere; it provides: If there are only ten men first and last interested in the particular trade dispute that has arisen, and the invasion of the civil rights is in no sense commensurate with the good or public welfare to the Dominion that is hoped to be obtained by the particular piece of legislation—

LORD ATKINSON: You really admit that the position may be such as to justify it?

Mr. STUART BEVAN: I think it might well be.

LORD ATKINSON: But you say it all depends upon the imminence, the dimensions, and the character whether it is the subject for Dominion legislation or not?

Mr. STUART BEVAN: That must be.

LORD ATKINSON: I suppose it must be.

Mr. STUART BEVAN: That is my submission. I can even go a step further than that; I should like to consider this a little more fully, but at the moment I think I could concede this, that legislation of this kind might well be passed with the proviso that it was to come into effect if and only when the Dominion Government, by Order in Council, or other machinery, declared such a state of emergency and danger to have arisen, that the operation of this statute should then begin, and that the provisions of the statute should be directed to the particular emergency that had arisen; I think I could concede that.

LORD ATKINSON: Many of the Judges here say that strikes lead to riots and disturbances; is the answer that there is no prospect of that in this case?

Mr. STUART BEVAN: If there was in this particular case, I submit that would not render the legislation *intra vires* because the legislation was not directed to this particular case, or any particular case, but it is in such wide terms, and embraces so many people and so many occupations in so many different circumstances——

LORD ATKINSON: Their object is to establish machinery for conciliation.

Mr. STUART BEVAN: Perhaps once in one hundred, or in one thousand times, the employment of the machinery would be justified, whereas on the balance of the occasions it would be wholly unjustified, because the strike was a small one, or the dispute was a small one, which, in the ordinary course, would be settled between the parties and would not spread elsewhere, and would not lead to any general strike throughout the Dominion.

LORD ATKINSON: You said you would refer to the evidence to show that that was an exaggeration.

Mr. STUART BEVAN: I must refer to the evidence. Your Lordships will appreciate this, that it is only partial in its application, it only refers to certain trades.

VISCOUNT HALDANE: A good many trades.

Mr. STUART BEVAN: A good many trades, what may be conveniently called public utilities; there are many trades outside it.

LORD ATKINSON: They are the vital instruments of communication for carrying food.

Mr. STUART BEVAN: There is this to be observed on the evidence. On the evidence, a strike amongst steel-workers was referred to as being a matter important to consider when the application to this Board of Conciliation in this particular case was made.

LORD WRENBURY: Is it proper to describe these trades as of great public importance?

Mr. STUART BEVAN: Certainly. Of great importance in the particular Province.

LORD WRENBURY: Are not all industries of importance in that respect?



Mr. STUART BEVAN: Yes, but the supply of electricity is of supreme importance to the city of Toronto. Whether a city is properly supplied with electricity is of importance to any other city. I was going to point out the curious result one gets from the application of a statute of this kind to the particular case. When the Board of Conciliation was applied for it was pointed out in the evidence that there was a strike among steel workers somewhere else in the Dominion, many hundreds of miles away from Toronto, and one of the reasons for appointing the Board was suggested to be the unsettled state of industries in general. The steel workers were outside the provisions of this Act altogether; it had no operation at all on them and therefore to get the result in the case of a comparatively few, I think the total number was something between 300 and 400 electrical workers, there was this compulsory reference to the Board, whereas in the case of many thousands of steel workers in another part of the country, their work I should have thought just as much of public importance as the providing of Toronto with electric light, there was no power to apply the Act.

LORD ATKINSON: The result of their striking would not be so immediate.

Mr. STUART BEVAN: No, but it would be disastrous to the trading community.

LORD ATKINSON: If the railway men strike, and the writers of comic songs strike, the railway men's strike would be a more serious than the strike of the writers of comic songs.

Mr. STUART BEVAN: Certainly. In this case the evidence was irrespective of the particular circumstances of the case. We called responsible people who said that, if these people who were affected by the dispute had gone out on strike, Toronto would not have been plunged into darkness; they could have carried on, and it would apply in the case of the Toronto Commissioners, or any other Commissioners employing many thousands of men. If 10 of those men only had a quarrel, or one of the men had a quarrel with his employer, the subject matter of the quarrel affecting 10 of them, 10 of the many thousands, this Act would automatically come into operation, and the Board would be competent, although the remaining thousands in the Toronto Commissioners' employment were entirely indifferent to the strike, and were to be relied upon to take no part in it. It is the generality of the application of this Act that I am contending renders it *ultra vires* the Dominion Parliament, because it is an interference with civil rights in the Province, without reference to the particular circumstances of the dispute that may have arisen. A violent interference with the civil rights without reference to the evil that it is hoped to cure by that interference.

LORD ATKINSON: There is much in that.

Mr. STUART BEVAN: I should think if the statute is to be national, the evil ought to be national, and it is to be observed that in the reported cases there is only one case, because it is not true of the Russell case, that really falls into another category, putting that on one side, the only case where interference with civil rights has been justified, where section 91 confers in express terms rights upon the Dominion, is the pulp case, which was a case of war emergency. The case that I rely on in support of my argument is the other war case, the Board of Commerce case.

VISCOUNT HALDANE: There we approached it from the other side.

Mr. STUART BEVAN: That is reported in 1922 1 Appeal Cases, at page 191. If ever there was a case in which this doctrine that a particular matter had ceased to be in the local and Provincial interest, but had become one of Dominion interest, this was the set of circumstances in which that doctrine might have been invoked, because it had to deal with a matter no less serious and of no less importance than profiteering in food, a matter which one would have thought

the Dominion were closely interested in. This was sort of emergency legislation, if I may so call it, enacted after the war in 1919, designed to keep down the price of food, and to ensure proper and fair distribution of food throughout the Dominion. The head note is: "The Combines and Fair Prices Act, enacted by the Parliament of Canada in 1919, authorized the Board of Commerce, created by another statute of that year" etc. (Reading to the words) "The power of the Dominion Legislature to pass the Acts in question was not aided by section 91, head 2 (trade and commerce) since they were not within the general power; nor by section 91, head 27 (the criminal law) because the matter did not by its nature belong to the domain of criminal jurisprudence." That case on the contention of the parties to the dispute raises the very point that the present case raises.

VISCOUNT HALDANE: I see it was raised by a special case in the Supreme Court, and the six Judges of the Supreme Court were evenly divided, so that we did not get much assistance.

MR. STUART BEVAN: No, my Lord, and being deprived of that assistance you came to the conclusion that the contentions I am making in this case applied to the facts in that case were correct, and in my submission there is no distinction between that case and this case, except that legislation directed against profiteering, and these various matters which are set out in the head note, would at first sight at any rate seem to be more of Dominion importance as affecting the interests of the Dominion at large than the matters which are the subject matter of this legislation which we attack here. It was not decided or contended. As I shall point out in a moment there were two grounds upon which this Dominion legislation could be looked at, first of all, the ground of emergency caused by war, famine, plague, or anything else; it was war in these cases, because it was the period just following the war. It was not contended that the matter must be looked at from that point of view, and, if the Court took the view that the circumstances were not such as to constitute an emergency justifying the legislation, it was open to the appellants I think in that case to advance the alternative view, that, putting aside altogether the question of emergency, such a matter as profiteering and the regulation of food supplies was a matter which in the circumstances then existing was essentially a matter of Dominion interest. The separate point was never taken, nor could it in my opinion be taken, because in truth it was not a separate point, and the emergency point which loomed so large in these two later decisions of your Lordships' Board is only a way of expressing in the altered circumstances of the time what is really to be gathered from the decision in the Russell case of years ago; it is simply a development of it.

VISCOUNT HALDANE: You say it was the magnitude.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: Not so much the quality as the quantity.

MR. STUART BEVAN: Yes, the quantity. Before I go to your Lordships' judgment, may I read the arguments of my learned friend Mr. Newcombe and Mr. Mathew on page 192. They appeared for the Attorney General of Canada, and it is interesting to see the points that were taken. "It was within the powers of the Parliament of Canada under sections 91 and 101 of the British North America Act, 1867, to constitute the Board of Commerce"—

VISCOUNT HALDANE: What is section 101?

MR. DUNCAN: The establishment of Courts of Dominion jurisdiction.

MR. STUART BEVAN: "The Combines and Fair Prices Act dealt with public evils prevailing throughout the Dominion, not matters which were of a merely local nature, or otherwise competent to any Provincial Legislature", etc. (Reading to the words) "The criminal provisions were to be administered by Provincial Courts" and so forth—"within section 91, head 27 of the criminal law."

Those are the arguments for the Attorney General for Canada.



VISCOUNT HALDANE: Were all the points taken; was trade and commerce taken?

Mr. STUART BEVAN: Yes, trade and commerce, criminal law, and emergency.

VISCOUNT HALDANE: So that the three points were taken.

Mr. STUART BEVAN: Yes, but the comment I make is, that one of the points was not split into two, namely, emergency, and the second point, whether that is right or wrong, still there is the matter of Dominion wide interest which has really passed out of the province of the Provincial Legislature. Separately, as I respectfully submit, there is the argument which I venture to put a little earlier in the day, that the considerations as applied to what is a matter of Dominion interest, and what is a matter justified by the emergency of the case, are really stating the same points in two different ways.

LORD ATKINSON: You say it must have a wider extent, be abnormal in its nature, and so threatening or injurious in its operation.

Mr. STUART BEVAN: Undoubtedly; I am obliged to your Lordship, that is the way in which I desire to put it.

The judgment of the Board was delivered by Lord Haldane and is at page 193. Your Lordship having dealt with the nature of the legislation says then at page 196: "In these circumstances the only substantial question which their Lordships have to determine is whether it was within the legislative capacity of the Parliament of Canada to enact the statutes in question."

Then the next paragraph deals with the restrictions empowered by the statute.

LORD ATKINSON: The whole point of the judgment is after referring to those cases, it says their Lordships do not find any evidence that the standard of necessity referred to has been reached.

Mr. STUART BEVAN: I am coming to that. On page 197 Lord Haldane says: "The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in wartime. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit in time, and to apply throughout Canada." The same observation can be made with regard to the legislation in this case: "No doubt the initial words of section 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally", etc. (Reading to the words) "This result was the outcome of a series of well known decisions of earlier dates, which are now so familiar that they need not be cited."

VISCOUNT HALDANE: Pausing there for a moment, what does that mean, that the regulation of trade and commerce did not by itself enable interference with subjects specified in the enumerations of section 92, but, if there was anything under this head of section 91 which could interfere, such as Dominion companies, then regulation of trade and commerce could be prayed in aid of the powers so conferred upon the Dominion.

Mr. STUART BEVAN: That I think is what it means, as is shown in the John Deere Plow case, where judgment was delivered by your Lordship.

VISCOUNT HALDANE: That was the case of a company incorporated by the Dominion of Canada under the powers which are expressly given to it in section 91. Under section 92 there are companies with provincial objects. Is there anything about companies with non-provincial objects in section 91; I am not sure that there is.

Mr. STUART BEVAN: No, there is not.

VISCOUNT HALDANE: Still, it is within their power, because there is no enumeration in section 92 of companies with non-provincial objects, and, therefore, they remain under peace, order and good government of Canada.

Mr. STUART BEVAN: May I read a passage from the judgment in the John Deere Plow case, which is reported in 1915 Appeal cases, at page 330. The passage I want to refer to is on page 340.

VISCOUNT HALDANE: Perhaps we had better finish the Board of Commerce case first.

Mr. STUART BEVAN: Yes, I will come back to the John Deere Plow case. On page 198 the judgment goes on: "For analogous reasons the words of head 27 of section 91 do not assist the argument for the Dominion. It is one thing to construe the words 'the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters,' as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application."

VISCOUNT HALDANE: If that is right, it is quite distinct.

Mr. STUART BEVAN: Yes, one gets that again in a later judgment of this board, in the Reciprocal Insurers case.

VISCOUNT HALDANE: That is Mr. Justice Duff's judgment?

Mr. STUART BEVAN: Yes. "For analogous reasons their Lordships think that section 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada," etc., etc. (Reading to the words) "Such a case, if it were to arise would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case"—my friend says here, in this case, and I contest it—"and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible.", etc., etc. (Reading to the words) "But even this consideration affords no justification for interpreting the words of section 91, subsection 2, in a fashion which would, as was said in the argument of the other side, make them confer capacity to regulate particular trades and businesses."

VISCOUNT HALDANE: I have been wondering what there is to be said for distinguishing the present case of the Lemieux Act from that. No doubt it was very important to pass the Lemieux Act, and no doubt it was very important to pass the Combines Act, but, in the case of both, it looks as if the same reasons applied, excluding the case of an emergency and regarding them as coming within the jurisdiction of the province.

Mr. STUART BEVAN: Yes, I submit that concludes the matter. The Dominion wide importance of the matter cannot be minimized, because it was food, which was essential to the well-being of the community. Certain provinces produced more food than others in Canada, and it may be that provincial legislation was inadequate, or might be thought to be inadequate.

VISCOUNT HALDANE: We shall hear Sir John Simon and Mr. Duncan, but, so far as opening the facts to us, I do not know what you can open in the present instance anything further. There seems to be a considerable analogy



between the reasons for the Combines Act and the reasons for the Lemieux Act.

Mr. STUART BEVAN: Yes, and the same criticisms were directed to the legislation in the Board of Commerce case by your Lordships' board as must be directed, I submit, to the legislation in this case.

VISCOUNT HALDANE: In the Combines case it was not a question of convenience or expediency, but of emergency only.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: But at the same time there was the difficulty of distinguishing *Russell v. The Queen*.

Mr. STUART BEVAN: Yes, and your Lordship says: "It has been applied with reluctance and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal."

VISCOUNT HALDANE: If *Russell v. The Queen* was to be taken literally to be right in the spirit as well as in the letter Mr. Duncan would have a strong case; the case would have got him easily over the fence, if it had been all that it was once thought to be.

LORD DUNEDIN: If Lord Watson had had *Russell v. The Queen* to decide after his own case he would have decided it the other way.

Mr. STUART BEVAN: Sir Montague Smith said there were special facts which justified the conclusion they came to in that particular case. Your Lordships remember how they likened drink to explosives and dangerous noxious drugs.

VISCOUNT HALDANE: Has Mr. Lawrence looked through the McCarthy case to see whether anything was said about *Russell v. The Queen*? It might be just as well to look and see whether their Lordships relaxed and let themselves go on *Russell v. The Queen* at any point.

Mr. STUART BEVAN: I have here the case of the Dominion Licence Act 1883 and 1884, in the Privy Council in 1885.

VISCOUNT HALDANE: Was I in that case?

Mr. STUART BEVAN: Yes, my Lord.

VISCOUNT HALDANE: My recollection is that many things were said in the course of the argument, and one reason why the Board did not give judgment was that they did not want to say things in the judgment which were said in the argument.

Mr. STUART BEVAN: My friend Mr. Lawrence draws my attention to a reference by Lord Davey, as he was, to the *Russell* case: "What was the decision in *Russell v. The Queen*," etc., etc., (Reading to the words) "or carrying arms".

LORD DUNEDIN: I do not see that that carries you very far. Poison and arms are very bad things; so, according to this case, is liquor; so here are trade disputes.

Mr. STUART BEVAN: Then Sir Montague Smith says this: "That is the ground of decision, that it did not fall within any of the matters in section 92. Rightly or wrongly that is the decision."

VISCOUNT HALDANE: He did not say it was criminal law.

Mr. STUART BEVAN: No. Answering, if I may, Lord Dunedin, I should submit that the circumstances in the two cases are very different. The position in *Russell v. The Queen* was that the drink problem had become a very serious one, and the unlimited access to drink was as dangerous to the state as unlimited access to noxious drugs, and so forth. That was dealing with a state of things constituted by the drink position as it existed at the time of the legislation, and

it may very well be that drink had been carried to such an alarming extent, and was being so gravely abused that some legislation was necessary in the Dominion interest.

LORD ATKINSON: It is only when it is urgently required in the public interest.

VISCOUNT HALDANE: "Urgently" wants definition.

LORD ATKINSON: There is no other word you can use.

VISCOUNT HALDANE: The life of the State must be in some way supposed to be in peril; perhaps it was in the liquor case, but it must be imperilled in some way such as by war.

Mr. STUART BEVAN: Your Lordship says it is a question of public interest. For "a question of public interest" I should like to substitute "of dominion wide interest", because it is only if the interest is Dominion wide that the Dominion Legislature can begin to think whether it has power to legislate.

LORD DUNEDIN: I can quite see that in the case of a fanatical teetotaler there is no question in the world that is so important as preventing me drinking a glass of beer or whisky; but it is not everybody's view, and, if you do not look with extreme eyes, it is very difficult to my mind to draw the distinction between the importance of having a general temperance system and the importance of having a general system for regulating trade disputes.

Mr. STUART BEVAN: The question that your Lordship puts to me invites the answer that one must look at it with local eyes, with eyes that know the locality and the needs of the situation in the particular district.

VISCOUNT HALDANE: Take the slave trade. In the United States the slave trade existed only in certain States; it existed in three of the Northern States, but in all the other Northern States it did not, and it existed in the organized Southern States, but not in the new ones south of California. It was said slavery was such an iniquity that the United States must put it down or go to war with the States that would not obey them. On the other hand the Southern States said: Slavery is an institution as old as Christianity, and older, and it is within our rights. President Cleveland would not take the Northern view. He said: I am not going to war on account of the slavery, but I am going to war for the Union, and he drew a great distinction between the question of slavery and the question of maintaining the Union. He never would admit that to put down slavery was a justifiable reason, and yet to a great many people in the North it was everything.

LORD ATKINSON: In the Russell case no evidence was given as to the extent to which intoxication was rampant; it was merely the existence of the possibility to get drunk.

Mr. STUART BEVAN: Now, I will go to the John Deere Plow case, which is in 1915 Appeal Cases, at page 330. That deals very fully with trade and commerce.

VISCOUNT HALDANE: The importance of this case is that it was trade and commerce only. My recollection is that the Dominion had power to incorporate companies with non-provincial objects, Dominion companies they are called, and then we said the regulation of trade and commerce enables them to make illegal any State regulation with regard to property and civil rights which conflicts with that.

Mr. STUART BEVAN: Yes. The passage is on page 340. It is referred to in your Lordship's judgment in the Board of Commerce case. "Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Company v. Parsons* on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regu-



lating trade. This head must, like the expression, 'Property and Civil Rights in the Province', in section 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade." That is the passage your Lordship had in mind. I pray it in aid in another connection. Your Lordship will remember that when I opened this case I put it to your Lordships on various grounds with regard to section 92, I relied not only on property and civil rights in the provinces, which is enumeration 13, but on enumeration 8 "Municipal Institutions of the Province", and, having regard to this passage in the John Deere Plow case, at page 340, if it be established that the Dominion Parliament could create such companies then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. I respectfully desire to put it in another way with regard to municipal institutions. If it be established that the Provincial Parliament can create municipal institutions, which is undoubtedly the case here, then it becomes a question of interest to the Provincial Parliament in what fashion the municipal institutions, which they have created, and which they alone can create, can be permitted to trade. That is why I rely on the additional enumeration, that is a separate and independent point from property and civil rights, the enumeration upon which I have appeared to rely more than the other, but it is an important part of my argument.

VISCOUNT HALDANE: The John Deere Plow case says that regulation of trade and commerce comes in when you have the power *aliunde*.

LORD DUNEDIN: It is really a carrying out of the Railways case. The power there was ancillary to railway legislation, and this power was ancillary to forming companies.

Mr. STUART BEVAN: Yes, my Lord, and so this power here is ancillary to the power of the Provincial Legislature to create municipal institutions.

(Adjourned to Thursday next at 10.30 a.m.).

### THIRD DAY

COUNCIL CHAMBER, WHITEHALL, S.W.1,

THURSDAY, November 20, 1924.

Mr. STUART BEVAN: When your Lordships' Board adjourned, I had drawn attention to the Board of Commerce case, the reasons and principles of that decision being the foundation of my appeal in this case.

There are two other cases which I should like to refer to shortly, and those will conclude the references to authority which I have to make. The first is *The Attorney General for Canada v. The Attorney General for Alberta*, reported in 1916, 1, Appeal Cases, on page 588; the judgment of the Board, which was delivered by Lord Haldane, begins on page 593. Perhaps I may read the head note to put your Lordships in possession of the facts. It was one of the cases in which the Dominion legislation was held to be *ultra vires*.

VISCOUNT HALDANE: It was held that insurance was not one of the heads in section 91?

Mr. STUART BEVAN: That is so. I think I may go straight to your Lordships' judgment, on page 595. The two earlier pages recite the sections of the Act which were impugned. Lord Haldane says: "It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of section 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in section 92. There is only one case, outside the heads enumerated in section 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under section 92. *Russell v. The Queen* is an instance of such a case. There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this Board makes it clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion. No doubt the Canada Temperance Act contemplated in certain events the use of different licensing boards and regulations in different districts and to this extent legislated in relation to local institutions. But the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction." The two instances where that principle has been applied are the *Russell* case and the *Pulp* case. Those are the only two instances, except the subsequent Licensing case, which was really determined by the judgment in the *Russell* case, where this principle, which, in your Lordships' words, must be "applied only with great caution", has, in fact, been applied.

VISCOUNT HALDANE: I think it is worth while reading at the top of page 597.

Mr. STUART BEVAN: If your Lordship pleases. "Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russell v. The Queen*. No doubt the business of insurance is a very important one which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the board from the bar been well founded. Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of *John Deere Plow Company v. Wharton*. But if a company seeks only provincial rights and powers, and is content to accept such rights and powers in other provinces from the province of its incorporation, as has been explained in the case of the *Bonanza Company*."



VISCOUNT HALDANE: The last sentence needs a word of qualification. That is true with regard to the legislation that existed at the time in Ontario when the Bonanza case was decided, but it is not necessarily true in the provinces where the Ashbury case applies. The provinces do differ as to the principles with regard corporations.

Mr. STUART BEVAN: My real purpose in reminding your Lordships of that decision is that, when one comes to consider the evidence in this case, I rely upon the language used by your Lordships in that case, that the principle is one that must be applied only with very great care.

LORD DUNEDIN: I take it that the argument against you is extraordinarily clearly brought out by that one sentence of Lord Haldane's speaking of the Russell case?

Mr. STUART BEVAN: Yes.

LORD DUNEDIN: If we substitute for the words "prohibiting the liquor traffic", you could really read that as applying to this case, "the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing" a uniform system of legislation for dealing with the suppression of strikes throughout Canada...

Mr. STUART BEVAN: There must be some limitation, because, if that is to be carried to its full extent, the Dominion Parliament would have the power to legislate generally with regard to any matter.

LORD DUNEDIN: That is what Lord Watson said in this case.

Mr. STUART BEVAN: And, therefore, it may very well be that your Lordships will look at the facts of this particular case, first of all, the provisions of the statute itself, which, of course, disclose the purpose to some extent, and to the evidence in the case as to the conditions existing.

LORD ATKINSON: Is not that really the most important point, the conditions, as they existed, to which this legislation was intended to apply.

Mr. STUART BEVAN: That is it.

LORD ATKINSON: One of the difficulties that strikes my mind is, if this system of conciliation was merely erected for the purpose of dealing with disputes that were in immediate contemplation, that is one thing, but if it was dealing in advance with something that might or might not arise, that is another.

VISCOUNT HALDANE: If the case is analogous to the case of Russell v. The Queen, it might justify immediate legislation.

Mr. STUART BEVAN: In the Board of Commerce case attention was drawn by this board to the nature of this legislation, which was not directed to a particular state of things, it related to all, and it was indefinite in its application, and the Act would be in existence until it was repealed, and it would affect everybody in the provinces coming within the provisions of the Act for all times.

VISCOUNT HALDANE: The relevance of this case is this. We said: No doubt insurance is a very highly important business carried on all over Canada, but still it is a matter with which the provinces can deal under section 92, and, therefore, as they have that right exclusively, it cannot come within the special application of peace, order and good government, and it does not come within trade and commerce.

Mr. STUART BEVAN: Yes, my Lord, that is well established by this case.

LORD DUNEDIN: I have yet to understand the distinction with regard to the generality. It is no use casting up to me the words of Lord Watson that there must be a limit somewhere. The question is whether this case is not of the general sort, and I do not for the moment find it very easy to see the difference. Insurance is quite different, because insurance is not everybody's matter. A

trade dispute is so universal that it permeates the whole of society. It would almost drive you to this distinction, which would seem rather slender, that, although there may or may not be a trade dispute, there always is a thirst which some people do not want to be gratified by alcohol.

MR. STUART BEVAN: I am going to ask your Lordships to treat that case as a case which is *sui generis*.

VISCOUNT HALDANE: Supposing there is an epidemic of cholera all over Canada, could not the Dominion legislate for that?

MR. STUART BEVAN: I should think they undoubtedly could.

LORD DUNEDIN: You would probably get that under the other clauses; it would be like a war.

VISCOUNT HALDANE: What I had in my mind was this: mere generality or mere importance will not be sufficient; must there be the other element, which you have just spoken of, danger to the State?

MR. STUART BEVAN: Yes, my Lord, that was my submission on the last occasion.

LORD ATKINSON: The evil that is sought to be corrected must have spread so far as to be of national importance, and must call for a speedy remedy. If the thing can be left in abeyance, and may never be required to be put into operation, and can be dealt with by the provinces, then its importance and generality are not enough?

MR. STUART BEVAN: There must be the element of emergency and prompt dealing with it in the Dominion interest.

LORD DUNEDIN: I am only speaking for myself, and others may very well think differently. To my mind the Russell case is not an emergency at all, and I think Lord Watson did not think so, because there is his remark about a thing, which was local to begin with, spreading so much as to go all over Canada.

VISCOUNT HALDANE: The Russell case is not on emergency.

MR. STUART BEVAN: I agree, if I may say so; there is not a word about emergency or public danger.

LORD ATKINSON: It was an endeavour to put down a vicious habit.

MR. STUART BEVAN: To control the use or abuse of liquor.

VISCOUNT HALDANE: As Lord Watson said, their Lordships in the later case were relieved from the difficult task of deciding whether they would have agreed with the Russell case.

MR. STUART BEVAN: Yes, In the Fort Frances case and the Board of Commerce case, the consideration of the Russell case was really dealt with under the head of emergency. As I submitted to your Lordships on the last occasion, a reference to the argument in both those cases, and to the judgments of the board, shows quite clearly that the position was regarded from three points of view: first of all, trade and commerce; secondly, criminal law; and, thirdly, emergency; and no separate point was taken that there was a fourth ground on which it could be considered, something short of emergency and Dominion-wide importance, namely, the case made in the Russell case.

VISCOUNT HALDANE: That you get from the judgment.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: The argument does not matter. A case like the Fort Frances case cannot help, because there there was an emergency; it was war legislation. There is no other case except the Russell case that I remember in which the Dominion has legislated successfully.

MR. STUART BEVAN: The Russell case and the Fort Frances case are the only two in all the history of this legislation, and the Russell case, I submit, is *sui generis*, and the Fort Frances case is emergency.



VISCOUNT HALDANE: I looked through yesterday the rather thick volume of the shorthand notes in the McCarthy case, in which no judgment was delivered. It is obvious that there was a suppressed feeling that their Lordships might not have decided the Russell case in quite the same way if they had had it before them. That runs all through the argument. You see it emerge in some of Mr. Davey's observations, and their Lordships do not dissent at all violently. They say: The Russell case has been decided, and we are relieved from the duty of saying whether it was right or not, because the Privy Council does not, as a rule, reverse its own decisions.

LORD ATKINSON: In the Russell case there does not seem to have been any evidence of the extent of the vice.

Mr. STUART BEVAN: No.

VISCOUNT HALDANE: Sir Montague Smith says quite clearly that the Russell case was decided upon the footing that it was outside the enumerated heads of section 91.

Mr. STUART BEVAN: Yes, in the words of Lord Davey, when at the Bar, in connection with the Russell case, your Lordships do not overrule, you explain.

LORD DUNEDIN: What was the legislation in the McCarthy case?

Mr. STUART BEVAN: It was temperance legislation.

VISCOUNT HALDANE: The Dominion, having had a victory in the Russell case, proceeded to follow it up by making all sorts of local regulations in the provinces for the purpose of carrying out the principle of the Russell decision. They said: You are not to sell any liquor without seeking licenses and so on. There was already in existence legislation which covered the field. Then their Lordships rose against the McCarthy attempt, but very significantly, after a very elaborate argument, they disallowed the Act without giving any reasons. What their motives were one can only guess.

Mr. STUART BEVAN: It is quite obvious from the argument that the decision in the Russell case was very strongly pressed, and was not dissented from, but was elaborately explained.

LORD DUNEDIN: Do not think that my remarks are too hostile, because, while I have really the greatest difficulty in seeing how you can distinguish your position from the Russell case, I have equally great difficulty in seeing how the other side can distinguish their position from the Board of Commerce case.

Mr. STUART BEVAN: The Board of Commerce case has given, in my submission, a new explanation or justification of the Russell decision. There was no evidence at all, and the precise state of things existing in the Dominion and the particular provinces at that time does not appear from the report, and we know nothing about it.

VISCOUNT HALDANE: You would be in a great difficulty if mere importance and mere generality were sufficient, and they have the Russell case to use against you, as saying that importance and generality are sufficient.

Mr. STUART BEVAN: Yes, my Lord, and I reply with every decision since the Russell case, up to the date of your Lordships' decision, in the Board of Commerce case.

May I be allowed to read one passage again on page 197 of 1922, 1, Appeal Cases, the Board of Commerce case, because it puts, in my submission, the Russell case in the right perspective and explains the decision. This is in course of your Lordships' judgment, on page 197: "The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special condi-

tions in wartime. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit of time, and to apply throughout Canada. No doubt the initial words of section 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in section 92, untrammelled by the enumeration of special heads in section 91." This is the passage: "It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in section 92, and is not covered by them. The decision in *Russell v. The Queen* appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the provinces."

LORD ATKINSON: In the case of famine they could deal with it?

MR. STUART BEVAN: Yes. "It is to the legislatures of the provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one." No one could dispute in that case, as in the *Russell* case, that the matter was of Dominion-wide interest. In this case the legislation was directed against profiteering, conservation and distribution of food supplies, which, in a Dominion like Canada, must necessarily be of Dominion-wide importance, particularly as some of the provinces are food-producing districts, where others are more the consuming districts.

VISCOUNT HALDANE: And they are of enormous territory.

MR. STUART BEVAN: Yes, and one would have thought, if the *Russell* case was to be given the application that will be contended for by the respondents in this case, that the principle of the *Russell* case would have applied to this case.

VISCOUNT HALDANE: Might not it be worth while to read just a few words in which, I think, Lord Watson, in one case, said that the provinces got, under the British North America Act of 1867, legislative powers, so far as the heads of section 92 are concerned, co-ordinate with that of the Dominion and quite independent, and that there was no question of overruling?

LORD ATKINSON: He says that in the case in 1896.

VISCOUNT HALDANE: I thought he had said it most distinctly in the case where he said that the Lieutenant Governor, when once appointed by the Governor General, was directly responsible to the Crown, and so were the legislatures.

MR. STUART BEVAN: My learned friend Mr. Lawrence has been good enough to refer me to the case of *Hodge v. The Queen*, which is reported in 9 Appeal Cases, where it says: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers



not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow."

LORD ATKINSON: That cannot be what Lord Haldane is asking for, because you are reading from a judgment of Sir Barnes Peacock. What Lord Haldane asked for was a judgment of Lord Watson.

VISCOUNT HALDANE: I think it was not in any of the cases that you have cited.

Mr. STUART BEVAN: I am sorry I have not got it. Perhaps my friend Mr. Lawrence may have an opportunity of looking it up. I am sorry, for the moment I cannot put my hand on it.

VISCOUNT HALDANE: The matter was touched in the Queen's Counsel case, but I think it was more distinctly dealt with in an earlier one.

Mr. STUART BEVAN: Perhaps I may have an opportunity of referring to the passage when my learned friend has discovered it.

Mr. DUNCAN: Is not your Lordship thinking of the case of the *Liquidator of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, which is reported in 1892 Appeal Cases, at page 437.

Mr. STUART BEVAN: The passage my friend Mr. Duncan is good enough to refer me to is this. It is at page 442: "The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government."

VISCOUNT HALDANE: If you look at the bottom of the page, there is something which may be relevant there.

Mr. STUART BEVAN: If your Lordship pleases. "It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislation meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share." I do not think that is the passage your Lordship was asking for, though it is a useful passage to state.

VISCOUNT HALDANE: It is the general doctrine. There is not really any doubt about it.

Mr. STUART BEVAN: No, my Lord. I was referring to the Board of Commerce case, and my submission is that since the decision in that case something has to be found to justify such a decision as that which was given in the Russell

case in the nature of abnormal circumstances, and your Lordship points out the distinction on page 197, in special circumstances. Then you give an indication of the sort of special circumstances to be looked for, such as those of a great war, and, if I may be allowed to add, famine or public danger.

VISCOUNT HALDANE: Or pestilence.

Mr. STUART BEVAN: Yes, but it must be something abnormal.

VISCOUNT HALDANE: Because otherwise you are up against the principle of the British North America Act. It was not a case of taking the number of provinces and bringing them into a federal relation with certain powers, but making a distribution of the legislative powers, according to the subject matter, and giving to the various provinces complete autonomy as regards certain heads of legislative power. The dominion had only a residuary power and certain specified powers. Each province is treated as a most important entity, as a country by itself, except that certain things are reserved. Whether it was a good form of constitution or not it was the form of constitution that was adopted in 1864 at Quebec.

LORD DUNEDIN: It has been pointed out to me, I do not think it has anything to do with the matter, but it is at least interesting, that in the Commonwealth of Australia Act, in the section which corresponds to section 91 of the British North America Act, there is a special heading "Conciliation and Arbitration for the prevention and settlement of Industrial Disputes extending beyond any one State."

Mr. STUART BEVAN: Yes.

LORD ATKINSON: They unified first and delegated after, which was the reverse in the case of Canada.

Mr. STUART BEVAN: Yes, the particular statute provides for the particular thing. I think attention is drawn to that in one of the judgments below in this case, but it is really, I submit, irrelevant to the construction of the statute in this case, and the application of the particular circumstances in this case.

There is only one other case which I desire to refer to, and that is on the question of the criminal law, the third ground. May I give your Lordships the reference to that.

VISCOUNT HALDANE: Is that the judgment of Mr. Justice Duff?

Mr. STUART BEVAN: Yes.

LORD ATKINSON: Lord Watson in that case in 1906 points out that if you make it a crime to dispute an *ultra vires* statute, you might get it *intra vires* by a device like that, and Mr. Justice Duff points out the same thing in his judgment.

VISCOUNT HALDANE: What is the case in which Mr. Justice Duff gave the judgment?

Mr. STUART BEVAN: It is the Reciprocal Insurance case. The judgment was delivered on 25th January last. It is reported in 1924, 2 Appeal Cases at page 328. I do not propose to read it.

VISCOUNT HALDANE: Mr. Justice Duff lays down the principle.

Mr. STUART BEVAN: Yes, in the terms which Lord Atkinson has been good enough to mention.

That, my Lord, concludes the authorities to which I have to draw attention. In those circumstances I think all that remains for me to do is to draw attention to the evidence that was given in this case; there is a good deal of it, but I will endeavour to select what really seems relevant, and if my learned friends desire to read any more, they will read it. There was very little evidence given on my side. I think the only evidence called on behalf of the commissioners was of two officials of the undertaking, who said that of 300 or 400 men



affected by this dispute, all of whom were not members of the union, I think 80 or 90 per cent were, had gone out, they could have carried on a limited supply, and it would not have meant plunging the city into darkness. But the evidence called on behalf of the respondents included that of the Minister of Labour, and various government officials, who spoke to the circumstances under which the Act was passed, and to the circumstances existing when the order for the appointment of this board was made.

LORD SALVESEN: The Minister of Labour of the Dominion Government?

Mr. STUART BEVAN: Yes, it was attempted to be established in both ways: that there was a national emergency first of all, justifying the passing of the Act, and secondly, a national emergency at the date when the operation of the Act took place as against my clients, and my submission when the evidence is examined is, that there was a complete failure to establish such an emergency or such abnormal circumstances at either date or at any date. The first witness called was Mr. Gunn. He was a trade union official who represented some of the members of the union in calling for the appointment of this board. His evidence is to be found at page 30 of the record. There was a discussion when he was sworn as to whether his evidence was admissible, or how much of the evidence that had been outlined in opening would be admissible, and the trial judge at page 30 says this: "I will receive evidence of facts. In the case of *Russell v. The Queen*, however, it was held that the Scott Act was within the jurisdiction of the Dominion Parliament, because it was a widespread measure for peace, order and good government, but no evidence was adduced in that regard. Therefore, I do not think opinion evidence can to be received here, and I anticipate that Mr. Duncan will confine the evidence to questions of fact, although it would be very tempting—with the defence which he has, no doubt, developed—to ask Mr. Gunn his opinion, but I would have to rule that out." Then on page 31 line 19 he is asked: "Are you also a member of the Dominion Executive of the Canadian Electrical Trade Union, of which the Toronto branch is a unit? (A) Yes. The Toronto branch is chartered by the Dominion Executive. (Q) What are the names of the various branches of the Canadian Electrical Trades Union?" then he gives the names of the various branches at line 23; then line 33: "What cities does the Toronto branch cover?" then he gives them. "All the cities and towns covered by the Central Ontario System of the Ontario Hydro Electric Commission."

VISCOUNT HALDANE: Will you tell us for what proposition you are reading the evidence. The evidence seems to show that these trade union arrangements disregard the boundaries of the provinces in many cases and go over the whole Dominion. You would not dispute that.

Mr. STUART BEVAN: No.

VISCOUNT HALDANE: They may be very important, more important in one province than in another, but you say the provinces have full power to deal with them.

Mr. STUART BEVAN: Yes. I suppose industrial conditions there are not much better or worse than the industrial conditions here, but this evidence that was adduced in support of abnormal circumstances originally justifying the legislation, and subsequently the making of this order, fails to show, I submit, anything of the kind, and the remarkable thing is it is to be on abnormal circumstances, and the necessity of the Dominion dealing with the labour situation as a whole. The making of the order in this particular case is relied upon in these circumstances as being justified by among other things this circumstance, that, at the time the order appointing the board was made, there was a strike among the steel workers a thousand miles away, and therefore it was very desirable to allay any possible industrial unrest in Toronto. The interesting

thing in that connection is that the steel workers of a thousand miles away were not subject to this Act, and, if the application of this Act was to be a remedy which in the Dominion interest had to be applied to Dominion disputes, one would have thought that, when such an important body as steel workers were out in their thousands a great many miles away, the application of this Act to the industrial community at large would have been necessary. The position with regard to the steel workers was a threatening one.

LORD DUNEDIN: Why did this Act not apply to the steel workers?

Mr. STUART BEVAN: Because they are not public utility workers, but it was an industry vital to the interests of the Dominion.

VISCOUNT HALDANE: It is not only public utility works, is it?

Mr. STUART BEVAN: It includes mines.

VISCOUNT HALDANE: Mines are not public utility works.

Mr. STUART BEVAN: One must look at the circumstances under which this Board was appointed. There was a threatened strike of public utility workers, or indeed it was very doubtful whether there was a threatened strike as your Lordships will see from the evidence. What happened was this. There was this dispute in Toronto concerning 300 or 400 men which left other public utility workers throughout the country quite cold. The strike among the steel workers resulted in a serious strike among the miners in another part of the Dominion.

VISCOUNT HALDANE: Steel workers are not included?

Mr. STUART BEVAN: No.

LORD DUNEDIN: I did not quite appreciate that. It seems to me apart from the evidence it certainly helps you in your argument in the differentiation, because it really does not go to the total prohibition of industrial disputes, but only a certain class of industrial disputes.

Mr. STUART BEVAN: Yes.

LORD DUNEDIN: Whereas the inculcation of temperance was to be upon everybody?

Mr. STUART BEVAN: Yes, the curious thing in the working out of the position was, this was an industrial dispute on the part of 300 or 400 men in Ontario, and was quite unconnected with the steel workers in some other provinces. They were quite unconnected with my strike, or threatened strike, or existing strike, and it did not interest any other workers or public utility workers at all, but the moment the steel workers, who are outside the operation of the Act, go on strike, whereas we are within the Act, the miners struck in sympathy with the steel workers.

LORD ATKINSON: Utility works are works upon which the existence of society depends, such as water, gas, and railway transit. I suppose that was the reason for it.

VISCOUNT HALDANE: That being so you are not to exercise your civil right to refuse to work for them. It come back rather to civil rights, does it not. Could the province have passed this under section 92. You say, yes.

Mr. STUART BEVAN: Yes, my Lord.

LORD ATKINSON: This gentleman's evidence goes very strongly to show that Canada might have very well applied the Act to catch the steel workers?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: I was thinking of this, supposing it had not been drink, supposing it had been something else, I will not put it as high as drugs, though a great many people take drugs. There was a famous man in this country who having a passion for alcohol, when he could not get alcohol, drunk ink, and he had to be restrained from drinking his own ink. Could the Dominion



have passed an Act saying that people were not to drink ink. Surely it would have to require an Act of the province to deprive a man of his civil right to drink from his own ink pot. You say the province could do it without the sanctions; they could not put in the penal clause.

MR. STUART BEVAN: They could under the express sanction of section 92. They could have passed a Provincial Act applicable to the position, but restricted in its operation within the province precisely the same as the Dominion Act.

LORD SALVESEN: And in fact they did it, except that they imposed no sanction?

MR. STUART BEVAN: Yes.

LORD DUNEDIN: And they could put in the penal clause?

MR. STUART BEVAN: Yes, undoubtedly. I do not know that it will assist your Lordships to read the evidence. I am not relying on this evidence, and perhaps I may leave it until I see what use of it is made by my learned friends.

VISCOUNT HALDANE: We have the advantage of Mr. Duncan, who argued the point the other way very fully in the Courts below, being here.

MR. STUART BEVAN: Yes, in the course of my long submission I think I have indicated all my points, and I do not know that at this stage it would assist your Lordship if I were to sum them up, because they are present to your Lordships' minds.

VISCOUNT HALDANE: I think we know them.

MR. STUART BEVAN: If your Lordship pleases.

MR. GEOFFREY LAWRENCE: My Lords, I do not know whether I can assist your Lordships by adding anything. Of course, in this case the decision against which we are appealing is decided upon the ground that this Act falls within regulation of trade and commerce, and I have some submissions to make to your Lordships upon that, if your Lordships think it is worth while at this stage for me to make them. The whole of the majority in the Court below have decided it upon that ground, and I submit to your Lordships that that is clearly erroneous, and that this is not the regulation of trade and commerce at all.

LORD DUNEDIN: The comments on the Russell case seem to bear that out?

MR. GEOFFREY LAWRENCE: Yes. I think it may be put very shortly in this way: That this is not regulation of trade and commerce at all; it is the regulation of the civil rights between employers and employed. It is perfectly true that it may be the Legislature which passes the legislation may have had at the back of their minds the protection of trade and commerce; they want to prevent strikes in order that trade and commerce may go on, but that is not the same thing as saying the legislation itself is the regulation of trade and commerce. I might illustrate that, I think, by putting the case of very proper legislation in certain circumstances providing for an eight hour day, or providing that people might work longer than an eight hour day; such an Act as that would as an ultimate result have some effect upon trade and commerce, but it would not be the regulation of trade and commerce; it would clearly, in my submission, be the regulation of the civil rights of the workmen, and it is clear, in my submission, that you cannot in any ordinary sense of the word say that a workman trades; he is not trading. His relations towards his employers are not those of a trader, and regulation of trade and commerce means the regulation of transactions between traders, between commercial men.

LORD DUNEDIN: It seems to me that with regard to certain things falling under public utilities, take water for instance, in respect of the provision of water for a big town, no doubt you are charged the water rate, but nobody would ever talk of that as trade and commerce.

Mr. GEOFFREY LAWRENCE: Exactly. There is this further criticism of it, that the legislation is not general, and it has been laid down by your Lordships' Board over and over again that regulation of trade and commerce placed as it is at the head of section 91, and having regard to the collocation and the other heads of section 91, that it must be read in the most general sense, and that it cannot relate to regulation of particular trades.

LORD ATKINSON: Must it apply to all trades; cannot it apply to one trade if it is a prevailing one over the whole Dominion?

VISCOUNT HALDANE: Do not answer that in too great a hurry. I think we have said that the specific power given to the Dominion to incorporate companies which are not restricted to provincial rights, but may trade all over the country, then trade and commerce may come in, and that it is an Act of regulation laid down by the Dominion that is governing these companies trading.

Mr. GEOFFREY LAWRENCE: Yes, that was general legislation applying to all companies.

VISCOUNT HALDANE: All Dominion companies?

Mr. GEOFFREY LAWRENCE: Yes, and of course they are trading companies which do not trade in any one particular province. As I understand your Lordship's judgment in the John Deere Plow case, it was this: that upon the true interpretation of section 91 and section 92 it appeared that the Dominion had power to incorporate under a general power companies which had Dominion-wide objects, and your Lordship said, taking section 91 (2), the regulation of trade and commerce, in conjunction with that general power, it enabled the Dominion to say that companies which we have incorporated must be allowed to carry on their business in the provinces; the provinces cannot impose licenses upon them which will absolutely prohibit them from exercising their statutory rights and powers within the province.

VISCOUNT HALDANE: You see the point of it is that the trade and commerce section was prayed in aid there in giving effect to something more than emergency legislation.

Mr. GEOFFREY LAWRENCE: But those companies with Dominion objects were companies which might be carrying on any trade, and therefore it would be perfectly general.

LORD ATKINSON: The provincial legislation could not destroy the right which the Dominion legislation had conferred upon their creatures.

Mr. GEOFFREY LAWRENCE: Exactly. In my submission your Lordships left untouched authorities which your Lordships had decided previously and affirmed afterwards, that under the head of regulation of trade and commerce you cannot regulate a particular trade or trades.

LORD ATKINSON: Unless it be a Dominion trade.

Mr. GEOFFREY LAWRENCE: Your Lordships of course put it in 1916 1 Appeal Cases, the Insurance Case.

LORD ATKINSON: Surely you could regulate the licensing trade and the sale of spirits; that would be only one trade?

Mr. GEOFFREY LAWRENCE: I submit not. May I refer your Lordship to one sentence in the Insurance Case in 1916 1 Appeal Cases at page 596, which was a subsequent case to the John Deere Plow case. Your Lordship said: "Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces".

VISCOUNT HALDANE: That was in effect saying that such licensing trade is within the competence of section 92.



Mr. GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: And therefore it is not affected by trade and commerce in section 91 which does not cut that down.

Mr. GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: But it is another thing to say that, when there is something within the province itself, the Dominion has the power to regulate the trade and commerce of that institution. We have left that untouched.

Mr. GEOFFREY LAWRENCE: If your Lordship pleases.

VISCOUNT HALDANE: The relevance of it is it means that trade and commerce may be used outside mere emergency powers.

Mr. GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: Where can it be used?

Mr. GEOFFREY LAWRENCE: The object of my drawing attention to it is, of course, that in the case of this Act, the Act is quite general, and therefore, in my submission, cannot be justified under the regulation of trade and commerce; it is not a general Act which applies to all trades and businesses. Assuming that it was dealing with trade and commerce within the meaning of the sub-head, it only applies to these limited businesses, to coal mines and so on.

LORD ATKINSON: Mr. Justice Hodgins draws the distinction. He says trade means production, distribution, sale and delivery of the goods.

Mr. GEOFFREY LAWRENCE: Yes.

LORD ATKINSON: And not the conduct of the operators.

Mr. GEOFFREY LAWRENCE: Exactly. I submit to your Lordships that there are two objections upon this point to this legislation being justified under the head of trade and commerce; first of all that it is not trade and commerce, and secondly that it is not general, and in order to be brought within the regulation of trade and commerce it has to be general legislation throughout the Dominion applicable to all trade and commerce, and secondly, that it has to be trade and commerce. All this is regulation of the civil rights of employers and employed to each other. I will not detain your Lordships longer upon that, but I want to say a word upon the question of whether this legislation can be justified under the general power under section 91.

VISCOUNT HALDANE: Is not the law on that point clear, that if the thing comes within section 92 it cannot be justified; if it does not it may be justified.

Mr. GEOFFREY LAWRENCE: Quite so, my Lord, that is absolutely clear.

VISCOUNT HALDANE: And it may be outside section 92 by reason of the provisions of section 92 being restricted, as for instance, to companies with provincial objects by the initial words of section 92, or it may be justified by it being within one of the heads of section 91, in which case there is a general power.

Mr. GEOFFREY LAWRENCE: That is so. What I wanted to submit to your Lordships was this; that the course of your Lordships' decisions has been absolutely uniform, from *Russell v. The Queen* down to the present day, though of course those principles have been applied to different facts, they have always been uniformly applied in this sense, that your Lordships have held if it comes within section 92, then it is only competent to the Provinces; if it comes within the heads of section 91, it is only competent to the Dominion, but there are certain subjects which are outside the heads of section 92, and although in one aspect and for one purpose they may be within the heads of section 92, yet in another aspect and for another purpose, they may be taken out of section 92, and taken to fall under the general power, and I submit to your Lordships that there is absolutely no difference between cases of emergency, and cases which in the words of Lord Watson affect the body politic; they all depend upon

the same principle, and the principle is that from their nature, or from the emergency which has arisen, they come to be altogether outside the heads of section 92.

LORD ATKINSON: What takes them out is their generality and their emergency.

MR. GEOFFREY LAWRENCE: The fact that they have some Dominion wide significance.

LORD ATKINSON: Must not they be abnormal in addition, not according to the ordinary course of events.

MR. GEOFFREY LAWRENCE: Possibly that may be so, but I apprehend that it would be competent to the Dominion to legislate with reference to something which was going to happen, such as a disease or famine.

VISCOUNT HALDANE: That is an emergency.

MR. GEOFFREY LAWRENCE: Yes, they might legislate in advance for such an event as that, but of course the heads of section 92 are so comprehensive that it requires very exceptional circumstances to get such a state of facts.

VISCOUNT HALDANE: You can go deeper into it. Whenever the State is set up in the full sense there is an implied power given to it to protect itself against sudden danger, and although there may be a distribution of powers in the normal state of things, yet it has ample capacity to save its own life.

MR. GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: I illustrated that on Tuesday by the instance of the American Civil War, where the President laid down doctrines that were challenged, but the general opinion was that they must have those powers. The question is, where do you look for them. You look for them in the initial words of section 91. We are dealing with a case of a kind outside the enumerated powers.

MR. GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: They do not cover it.

MR. GEOFFREY LAWRENCE: But whenever it is a matter which is undoubtedly of public importance, but public importance in each province, then the mere fact that it is of public importance in all the Provinces does not enable the Dominion to legislate upon such a subject.

LORD ATKINSON: I asked that question on Tuesday; if there was a certain condition of things prevailing in each of the provinces, and if they had legislated, would the Dominion Parliament be able to unify the Provincial legislation and legislate for the same thing?

MR. GEOFFREY LAWRENCE: I submit clearly not; I submit that is the crux of this case. Is it not absolutely clear that in this case if the provinces each had an Act in the terms of this Act, that it would be *intra vires* of each of those provinces, and it would meet any difficulty which there is? If once you concede that each province could enact an Act of a similar nature to this for the investigation of industrial disputes within its borders, and it would meet the situation, it clearly demonstrates that it is *ultra vires* the Dominion simply for the purpose of uniformity to pass this Act, and I think that gets at the very heart of the matter. It has to be something more than of public importance in each province to enable the Dominion to legislate under the general powers of section 91. It has to be something that is raised out of the category by abnormal circumstances, or by the nature of events, such a thing as famine, disease, or possibly the supply of natural gas, as to which there was a great crisis in Canada at one time. I do not know that there was ever any legislation passed with reference to it. Natural gas permeates the strata under the earth.

LORD DUNEDIN: There have been several cases as to that.



MR. GEOFFREY LAWRENCE: And I believe it may be that there was some legislation with regard to it.

LORD ATKINSON: Some cities are altogether lighted by it.

MR. GEOFFREY LAWRENCE: Yes, and if another province was to interfere with the supply of natural gas to one of the provinces which depend solely upon it, it may be that the Dominion Parliament in such circumstances would be able to legislate to prevent the evil.

LORD WRENBURY: If the subject matter is so wide that you cannot control in any one province, would that be enough?

MR. GEOFFREY LAWRENCE: Such circumstances might arise.

LORD WRENBURY: You know those words of Lord Haldane with regard to paramount importance.

MR. GEOFFREY LAWRENCE: Yes.

LORD WRENBURY: Is it not possible that the test whether the subject matter is one which is of such great importance in each province, that you cannot properly control it in one unless you control it in all, is only an extension of the emergency doctrine. Supposing there is no emergency, but very large subject matter, what is the case then?

MR. GEOFFREY LAWRENCE: If it is of such paramount importance that it cannot be dealt with in one province, it may be that it falls within, though it may be, on the other hand, that the frame of Confederation is such that it cannot be really adequately dealt with. One must recognize that when you have the frame of Confederation, it is not as completely satisfactory as a unitary system.

LORD ATKINSON: As the provinces have the same title to their legislation, quite as good a title as the Dominion, their powers could not be invaded unless there is some paramount purpose or object to be effected by the invasion of it.

MR. GEOFFREY LAWRENCE: Yes.

LORD WRENBURY: Lord Haldane's words in the *Board of Commerce* case were: "In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in section 92, and is not covered by them." Do not those words mean the paramount and overriding importance is the great test in that particular instance?

MR. GEOFFREY LAWRENCE: Certainly.

LORD WRENBURY: Is not that really the question we have to keep to, as to whether the subject matter is so large that it ought to be Dominion?

MR. GEOFFREY LAWRENCE: Yes.

LORD WRENBURY: That is a matter of evidence?

MR. GEOFFREY LAWRENCE: Yes, it is my Lord. I will conclude by drawing attention without referring again to the actual terms of the Act.

LORD DUNEDIN: I think I can in a sentence bring what Lord Wrenbury said to a point by putting the question: Could provincial legislation adequately cope with the difficulty or is it impossible for them to do so?

LORD WRENBURY: You have to get at what is the subject matter; emergency is an instance of it.

MR. GEOFFREY LAWRENCE: It is.

LORD WRENBURY: There may be other instances of it.

MR. GEOFFREY LAWRENCE: I submit the provincial legislature can adequately cope with it, and I submit provincial legislation could have been passed in these very words used by the Dominion.

LORD DUNEDIN: It is not so much passing it in the very words, but, having passed it, could it adequately cope with the mischief that it was sought to remedy?

LORD ATKINSON: Could it cope more adequately and efficiently than the separate legislation of the Province could; if it could not do it more adequately, is there a case for Dominion legislation at all?

MR. GEOFFREY LAWRENCE: No. One has to consider the mischief which this Dominion legislation hits at. One can see that from the Act, it is merely the investigation of a dispute and the publication of the report of the Board. The question is: Could not the provinces adequately deal with that, and I submit that they clearly could. Of course, there may be strike legislation of a wider order and of an emergency character which would be competent to the Dominion, but that does not affect the nature of this particular Act.

LORD DUNEDIN: You only deal with one dispute at a time, the one that is up; your point is that no Dominion tribunal could effect any greater result than a Provincial tribunal could.

MR. GEOFFREY LAWRENCE: Exactly, my Lord. Assuming for the purpose of argument that there may be some aspect of industrial strike which would be more adequately dealt with by the Dominion than the Province, I say that this Act does not deal with that aspect of the matter, it does not deal with the mischief, it deals simply with the investigation of these disputes which may be absolutely local.

LORD ATKINSON: It does not base the legislation on the greater efficiency of their mode of dealing with it than the Province could do; it does not base it on that?

MR. GEOFFREY LAWRENCE: No, it is not limited to Dominion undertakings, it is not limited to trade unions or sympathetic strikes or anything else in the nature of abnormal circumstances, it simply provides for the investigation of disputes between any employer who employs 10 men and any one of his men, and I submit to your Lordships that that is a matter which is of a purely local nature, and is one which can be dealt with adequately by the provinces. I desire to draw attention also to this which is no doubt very much in your Lordships' mind, that these matters of industrial conditions are matters which differ very much in different parts of the country, and when you are dealing with an enormous country like Canada it is of the greatest importance to keep that fact in mind. The conditions in Montreal, one of the greatest cities of Canada, and partly a French city, are entirely different from the conditions in Alberta, which is an agricultural country, and it may be of the very greatest importance that legislation upon these subjects should be dealt with by the particular legislature which knows best the conditions which are in force there, and it is very likely for that reason the Dominion even in enacting this Act has only passed it with regard to particular undertakings, they have not passed it in a general way; but however that may be, I submit to your Lordships that there is no case here of great national emergency which justifies the passage of Dominion legislation, and that this evil which is dealt with in this Act could equally well have been dealt with by the provinces.

VISCOUNT HALDANE: Now Mr. Duncan, Sir John Simon will be here, I suppose, later. It may be convenient to you now I think and it would meet what we want if you addressed yourself to the evidence. We want to know the importance of this legislation.

MR. DUNCAN: May I just say one word before I do it?

VISCOUNT HALDANE: Certainly, we do not want to circumscribe you at all.

MR. DUNCAN: It is submitted that there are two conceptions of government which are struggling for recognition before your Lordships, that is,



whether matters which are not mentioned in the enumerations of section 91, but are unquestionably of national importance, can be dealt with (a) By the Dominion Parliament or (b) Whether the legislation can only be passed by the co-operative action of the nine different Provincial Legislatures.

LORD WRENBURY: When you say: "are not mentioned in section 91," do you mean, and are mentioned in section 92?

Mr. DUNCAN: No, my Lord. I say matters which are truly of national importance, but not mentioned in section 91, and matters falling short of an emergency which strikes at the foundation of the State such as war.

VISCOUNT HALDANE: But they are, are they not, mentioned in section 92?

Mr. DUNCAN: Not specially.

LORD WRENBURY: You say even if they are mentioned in section 92?

Mr. DUNCAN: Possibly.

LORD WRENBURY: Do you mean that?

VISCOUNT HALDANE: I do not think he does.

Mr. DUNCAN: Even though they are mentioned in section 92 in a certain aspect; that is to say it may be they are matters of "Property and Civil Rights in the Province" which if it was only a local or private matter the province could deal with, but when it has transcended that, and when it has become a matter of national concern—your Lordships will want a definition of what is a matter of national concern, and I will come to that in a moment if I may—but when it unquestionably has transcended provincial importance must you seek your legislation in the nine different provincial legislatures, must it be co-operative legislation, or may you find that under the peace, order and good government clause in section 91? I submit that is the problem before your Lordships. There are two different conceptions of government here, or different conceptions of federalism which are struggling here for recognition, and your Lordships' decision on that matter will have a far-reaching effect on subsequent Dominion legislation.

LORD ATKINSON: I think Lord Watson's judgment has a great deal in support of what you say, but the difficulty is in determining what is of national importance.

VISCOUNT HALDANE: About the federalism, what is your point upon that?

Mr. DUNCAN: If I may put it shortly (and I want to develop it more fully in a moment) I say the British North America Act was founded on the Quebec Resolutions of 1864, most carefully drawn by the Canadian lawyers at that time after a most careful study of the American decisions on the American Constitution. The Quebec Resolutions were passed at the time the Civil War was raging. The war is sometimes perhaps put on the ground of an attempt to maintain the Union, but was in reality brought about because the Central Government could not legislate with respect to slavery in the separate States. There is the *Dred-Scott* case, and other decisions—

VISCOUNT HALDANE: War broke out before the *Dred-Scott* case, did not it?

Mr. DUNCAN: No, my Lord, I do not think so.

VISCOUNT HALDANE: No, I think you are right, the *Dred-Scott* case was somewhere about 1860, was it not?

Mr. DUNCAN: Yes, my Lord, 1856 or 1857.

VISCOUNT HALDANE: The Chief Justice gave his decision then. Then war broke out really upon the claim advocated in very carefully defined terms by Mr. Lincoln. It was not for putting down slavery, but for saving the Union. He said: I will save it even if slavery has to be maintained, and I will save it the more willingly if slavery is to be abolished. Slavery is not the main question

nor is it the main question whether the federal government has power to get rid of slavery, the main question was to maintain the Union.

MR. DUNCAN: Was that not very wisely done from President Lincoln's point of view, it gave him political control of the position. He was driven to that because of the decision of the Supreme Court of the United States that Congress, no matter what the urgency, could not touch a matter of master and servant, of slave and owner.

VISCOUNT HALDANE: I think the *Dred-Scott* case played a very little part in Mr. Lincoln's policy; it was not till quite late in the Civil War that he issued his Proclamation about abolishing slavery.

MR. DUNCAN: Quite late. He wished to get the fullest possible support in the North even from those who had a sympathetic leaning.

VISCOUNT HALDANE: He was not fully supported in the North about that, the democrats in the North were much against that, it was the more extreme Republicans under Mr. Greeley who tried to force upon him the abolition of slavery.

MR. DUNCAN: The only point I was making was this; That the Canadian Constitution was drafted by Canadian lawyers and Canadian statesmen at the time this war was raging, which in the public mind, and I suggest in fact, had to do with slavery. It was brought about because Congress was prevented from legislating on this matter by judicial decision. Now this is what the Canadian drafters of the Constitution did. They said: Above all things we must avoid what was probably a mistake in the American Constitution that is giving the residuum of power to the States, and we will use language sufficiently clear to give that residuum to the Dominion so that in any case in which the Dominion considers the matter is for the peace, order and good government of the country, that power lies with the Dominion. That is putting it in an extreme way.

May I put shortly what I propose to develop, if I may. If the second conception of Federalism is the proper one: that there are enumerations in section 91 and other enumerations in section 92, that those cover the whole legislative field except in cases of national emergency amounting to war on the Dominion, and so on, then who is to find that fact? If that is the conception there is practically no residuum except in cases of national emergency, and those words, which I suggest were most carefully drafted to give to the Dominion power to legislate for peace, order and good government of Canada, are by that gloss, I suggest, deprived of the effect which the founders of Confederation intended.

LORD DUNEDIN: Does that quite follow? I may not have caught your words, but it seems to me in saying what you said you assumed that 91 and 92 cover in their enumeration all possible human subjects; if they do not then there are some things which are both outside 91 and 92 and which fall into the residuum. You were rather saying that that conception put out the idea of a residuum which really was meant to be there, but if there are things that fall neither under 91 nor 92 they at least tumble into that residuum.

MR. DUNCAN: Yes, I grant that.

LORD WRENBURY: Is there any possibility of a residuum? The Act says: All matters not coming within section 92.

VISCOUNT HALDANE: There is one phase of it, namely, education, which is outside the powers of the Dominion Parliament, and the Provincial Parliament, which was left to be dealt with by the Governor General.

MR. DUNCAN: That surely cannot have been what was intended when they sought to create a residuum.

VISCOUNT HALDANE: I am never quite sure; I think they were very acute people who drew this, and they may have intended to leave it outside.



LORD ATKINSON: Regulation of attendance at schools.

Mr. DUNCAN: That is education, a separate matter, as agriculture and emigration are separate matters.

VISCOUNT HALDANE: It is section 93; "In and for each province the Legislature may exclusively make laws in relation to Education, subject and according to the following Provisions: (1) Nothing in any such Law shall prejudicially affect any right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the province at the Union: (2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec. (3) Where in any province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the province, an appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education: (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this section is not made, or in case any Decision of the Governor General in Council on any Appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then and in every such Case, and as far only as the circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this section and of any Decision of the Governor General in Council under this section". There are other cases in which competency is not directly given to the Parliament of Canada, and these were also withheld from the province. I have no doubt it was the result of a compromise between Catholics and Protestants. You would have to come back to the Imperial Parliament if there was a problem that had to be solved, and I am sure you would not be reticent.

Mr. DUNCAN: May I in answer to Lord Dunedin suggest this, that if the words "property and civil rights" are given the interpretation of local rights, there may be matters outside the enumeration of section 92, but the suggestion in this case on which my learned friends rely (and there I suggest the fallacy in their case lies) is that they say that this Act is one in relation to "property and civil rights". Then if you extend "property and civil rights" to comprehend entire freedom of control from Government legislation, there is nothing whatever that can fall outside the enumeration of section 92, because by so doing "property and civil rights" becomes the greatest residuum of all. That doctrine says we are Provincial citizens, members of some independent State, free from any interference by the Dominion Government under peace, order and good government, and we can say you must not interfere with our freedom of action, whatever it may be; we may have a civil right to take poison, as was suggested by Lord Watson, or to burn down a man's house.

LORD ATKINSON: You are a felon if you kill yourself.

Mr. DUNCAN: Or to take a glass of beer, which was the suggestion made the other day; is there a civil right to take a glass of beer? It may be a very desirable thing.

LORD ATKINSON: It is a civil right to have freedom of action in your food.

Mr. DUNCAN: Is it a civil right in a legal sense in which that right was given to the province?

VISCOUNT HALDANE: Does not it mean what people are to be allowed to do or not to do, is for the province?

Mr. DUNCAN: It may have the conception of an independent State.

VISCOUNT HALDANE: It is an independent State, it is cut into expressly by the enumerations of section 91.

Mr. DUNCAN: Yes, I quite concede that. I quite accept of course, with great respect, what Lord Watson said in the case of the *Liquidator General v. The Maritime Bank* that the desire was not to weld the provinces into one. But I do suggest that if it is a matter of Dominion concern, it was deliberately intended that there should be a Legislative Union in matters concerning the peace, order and good government of Canada, and that you must contrast section 91 with section 92, and the principal words in section 91 are: "To make laws for the peace, order and good government of Canada", and "Not so as to restrict the generality of the foregoing", and they enumerate certain matters; with that must be contrasted: to legislate for civil rights *in the province*; and No. 16, section 92, I suggest, gives colour to all the enumerations of section 92, because 16 says that the province may legislate generally for all matters of local or private interest in the province—"generally," that is, all these enumerations in section 92 are provincial enumerations.

VISCOUNT HALDANE: I am not sure; is not that an additional head?

Mr. DUNCAN: No. 16?

VISCOUNT HALDANE: Yes.

Mr. DUNCAN: Yes, an additional head, but it is "generally all matters," indicating that the previous 15 are also of a local and private nature in the provinces.

VISCOUNT HALDANE: I am not so sure about that; I think "civil rights" may be of a very public character. Take, for instance—it is a case that has not been cited here—the *Standard Bank v. The Government of Alberta*, as to whether the Government of Alberta had power to divert the subscriptions which had been made in New York and London for railway purposes in the province to a new system under which the revenue was to keep up the railway and take the subscriptions. It was said although it may have complete power over the civil rights of these people so far as they are within the province, yet as their money was outside the province you are interfering with the civil rights outside the province by altering the terms on which they paid their money in New York and London to the Bank of Montreal.

Mr. DUNCAN: That was the Royal Bank I think. I may say I rely on that, the province may deal with the civil rights in the province.

VISCOUNT HALDANE: Yes.

Mr. DUNCAN: But it may not deal with civil rights out of the province.

VISCOUNT HALDANE: Clearly not.

Mr. DUNCAN: And if you deal with labour unions which are spread throughout the Dominion it is necessary to have legislation, can it be done by provincial action in each province, if you are sure you can get it even.

VISCOUNT HALDANE: Why not. Supposing they all pass the identical Act.

Mr. DUNCAN: If they pass it, but will they pass it?

VISCOUNT HALDANE: I quite agree with you it may be very difficult to get them to agree.

Mr. DUNCAN: And in matters of national urgency, because three or four do not pass it, or pass it in other terms, or do not amend it as they can, there is a high national danger of disaster because, as I suggest, this conception of the British North America Act—

VISCOUNT HALDANE: Do not beg the question by calling it a national danger. I should have said that those who framed the Constitution of Canada



in 1864 or 1867 were responsible for making insufficient provisions for the invocation of the law; they did make certain provisions; for instance section 104.

MR. DUNCAN: That is for uniformity.

VISCOUNT HALDANE: That was by consent.

MR. DUNCAN: Yes, only by consent; I distinguish that. May I suggest the distinction on that?

LORD DUNEDIN: Did not they leave out Quebec?

MR. DUNCAN: Yes. I suggest mere desire for uniformity of law in trade disputes would be *ultra vires* just as a mere desire for uniformity of law in the Common Law Provinces in relation to contracts or as to rights of succession or status would be *ultra vires*. The test is, is this susceptible, is it capable of being of national importance, and is this legislation directed not to the uniformity but to a national law.

VISCOUNT HALDANE: How far do you carry that, Mr. Duncan? It is very important to know. There are many things that are very desirable for the nation in Canada; supposing the Dominion said it is very desirable that every Canadian subject should be able to read and write; would there be the power to deal with it?

MR. DUNCAN: I think that is no danger to the province because your Lordships would stand vigilant and say: this law cannot possibly be passed for the peace, order and good government of Canada, just as in putting questions to a jury you can withdraw it from the jury because of the facts.

VISCOUNT HALDANE: Why do you say education is not within peace, order and good government?

MR. DUNCAN: For one reason, because it is enumerated in another section of the British North America Act.

VISCOUNT HALDANE: What is the section?

MR. DUNCAN: It is section 93.

VISCOUNT HALDANE: What does that section say?

MR. CLAUSON: "In and for each province the Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions".

VISCOUNT HALDANE: It is the section I was looking at; it is "in each province". Still, supposing it to be a matter of great importance that the citizens of Canada should all be able to read and write, do you say your argument stops short of this, that the Parliament of Canada might declare that to be in operation throughout Canada, and, if so, why do you stop short of that?

MR. DUNCAN: I should think as a practical question they would stop short of that; one would say this is not capable of being that.

VISCOUNT HALDANE: It is not "peace, order and good government".

MR. DUNCAN: No, I would say this, that it is a practical question; a body of evidence was tendered to your Lordship as showing that from a political point of view it is of national importance. Then your Lordship will say: We are not entering the political arena; we are construing a statute of Parliament (which consists of persons drawn from every party of Canada and which takes on itself the burden of passing this Act believing that the circumstances call for it as a national matter), and we will say, well, we will at least put the onus on the other side. There are two answers, first it is not capable of being of national importance, and secondly, the facts show that it is not of national importance.

VISCOUNT HALDANE: It is really good government, education, or it may be.

MR. DUNCAN: Yes.

VISCOUNT HALDANE: But do you say the Parliament could do it? Supposing Canada as a whole were suffering from want of reading and writing and arithmetic, could the Parliament pass a law enacting uniformity, or could it not?

Mr. DUNCAN: If in fact it was of national importance Parliament could.

VISCOUNT HALDANE: If it was of national importance you say the Parliament of Canada could pass the Act notwithstanding that section 93 gives it to the province.

Mr. DUNCAN: I would not like to enter into that, that is a special matter set out in section 93.

VISCOUNT HALDANE: The point is that it is something desirable in the interest of the whole of Canada which cannot be secured.

Mr. DUNCAN: If your Lordship's illustration falls within the enumeration in section 92—

VISCOUNT HALDANE: I do not see much difference because in section 92 the words are exclusive also.

Mr. DUNCAN: But in the province.

VISCOUNT HALDANE: Yes; section 93 is "exclusively in the province." I think you are driven to say that if it is good enough and important to Canada as a whole that the Dominion can do it.

Mr. DUNCAN: If in fact it is required as a law under the peace, order and good government of Canada, I suggest to your Lordship that the Act is wide enough to cover that, that that was certainly what was intended and that was the original conception.

VISCOUNT HALDANE: If it is important enough and the provinces are not able to agree themselves, the Dominion Parliament under "peace, order and good government" can make a law saying every child in Canada has to learn to read and write.

Mr. DUNCAN: It is putting an extreme case.

VISCOUNT HALDANE: I am putting it to the test. I do not suppose anybody is going to try to do it.

Mr. DUNCAN: No, because the legislators are reluctant to assume responsibility.

VISCOUNT HALDANE: I know they are.

Mr. DUNCAN: They wish to push it somewhere else. I should say if the Parliament of Canada did interfere in provincial matters the presumption is it did it for a reason, but the only question left, if your Lordships say there is no evidence to show to the contrary, is, is it capable of being a law for the peace, order and good government of Canada.

VISCOUNT HALDANE: I am assuming it may be certainly, education generally is part of good government, it falls within the words.

Mr. DUNCAN: Well, does it, my Lord, when one looks at the question of national concern?

VISCOUNT HALDANE: There are plenty of Crown Colonies who have nothing but the words "peace, order and good government" and under those they set up education statutes right and left.

Mr. DUNCAN: Yes, but where peace and good government on one side is contrasted with matters of purely personal concern in section 92 then a new colour, I suggest, comes into the phrase "Peace, order and good government."

VISCOUNT HALDANE: The words are taken from the old Canadian Provincial Governments, and from the State Government in Australia, and under the general words they set up systems of education right and left.



MR. DUNCAN: As to their origin may I just point out, I intend to rely on this at a later stage, that the original words were "Peace, welfare and good government," and those were the words in the previous Canadian Constitution.

VISCOUNT HALDANE: That is rather something against you, "welfare."

MR. DUNCAN: Welfare is wider, but "order" is more precise and has closer reference to the matter now in hand, which is civil disturbance and disorder which may be expected to grow from strikes when the Militia must be called in to keep order in the province.

LORD WRENBURY: You take "peace, order and good government" too far; the Act gives the Dominion power to legislate in all matters of peace, order and good government but limited to certain matters. You have to say that you are within that field.

MR. DUNCAN: May I put it the other way, is it not that the Dominion has power to legislate for peace, order and good government except in certain cases?

VISCOUNT HALDANE: I rather agree with you because I think that is right. I think peace, order and good government covers everything the Dominion has got under its reserved powers.

LORD WRENBURY: It is "To make laws for peace, order and good government of Canada in relation to all matters not coming within" section 92. That is limited authority.

VISCOUNT HALDANE: Does not it imply that those matters are in the provinces also, peace, order and good government, but are taken out?

MR. DUNCAN: Yes, I accept that.

LORD SALVESEN: These words which are pointed out would cover every sphere of legislation, in construing sections 91 and 92 must not you read in: peace order and good government where there is a serious or threatened disturbance, or something like that; then you would bring in the emergency as the only justification for legislating in the way that the Dominion Government has proposed.

VISCOUNT HALDANE: All the enumerated heads are interfered with, otherwise you have full power?

LORD SALVESEN: Yes.

MR. DUNCAN: Yes. The only difficulty I have with that from the point of view of the construction of the Statute is that the Statute does not say that you may invoke these powers only in case of emergency. I have cases in the Supreme Court of the United States which I intend to give your Lordships, where it is quite clearly laid down, that no emergency can possibly transfer power from one legislature to another; emergency cannot re-write a Constitution, and who is to define "emergency."

VISCOUNT HALDANE: Do not be too sure about that. The United States have said that the inherent police power although it primarily belongs to States is also available for the Federal Government, and what limits there are to that police power I do not know. If you can tell us anything about it in the course of your argument to-day or to-morrow we should like to know.

MR. DUNCAN: The police power is mentioned in the case your Lordship read of *Hamilton v. The Kentucky Distillery*. The later cases as to the police power are the Narcotic cases, where the Supreme Court held that Congress had power to deal with narcotics, and with white slavery, as it was called there.

VISCOUNT HALDANE: On what ground?

MR. DUNCAN: On the regulation of inter-state commerce and commerce with Indian tribes.

VISCOUNT HALDANE: Did they say anything about the police power?

Mr. DUNCAN: Yes, they said that came under the police power. My conception of what that means in the United States is that the police power is the imposition of duties on States citizens. What they did not have was a residuum, and what, until very recently they thought it did not get, was the right of Congress to impose responsibilities and duties on States citizens; which is all that is done here; there is no interference with civil right.

VISCOUNT HALDANE: You say the genesis of the police power is the desire to have the means of asserting authority which they claim to have.

Mr. DUNCAN: Yes, to police, to say you shall not in the public interest do so and so. The only place they can find it is under their regulation of trade and commerce clause, which is a much less wide clause than ours; that is another branch of the argument. May I return to the original point, the two conceptions, and put another way of stressing it. If the second conception is right, that in matters which are of national concern you may only legislate by co-operative action, the inconvenience and danger attendant on that does not need to be stressed. If that is so a great mistake was made in drafting the British North America Act, but I suggest it was not the original conception in *Russell v. The Queen*, or in the case in 1896 Appeal Cases, Lord Watson's case. I will come to that in a moment; it perhaps can be put in a word. My submission to your Lordships is that in matters which are truly of national importance Canada is a State and not a congeries of provinces.

VISCOUNT HALDANE: Would you carry that so far as to say that even where there is no emergency or peril to national life that is so.

Mr. DUNCAN: As in *Russell v. The Queen*?

VISCOUNT HALDANE: Then you say you do not want emergency.

Mr. DUNCAN: I say emergency is not written into the Constitution at all.

LORD ATKINSON: Nothing is written into that Constitution except they are not to interfere with section 92 and pass laws relating to peace, order and good government.

LORD DUNEDIN: The views of emergency that prevailed are not that emergency transfers from one category to the other but alters the nature of the subject-matter.

Mr. DUNCAN: Yes. That is not the only thing that will alter the character of the subject-matter; you do not have to resort to emergency to find that matters originally local and private have attained Dominion importance as Lord Watson said. May I refer your Lordship on the question of emergency, because we have reached it before I intended to, to the case of *Wilson v. New* in 1917? That was decided by the Supreme Court of the United States, and it is reported in 243 United States Supreme Court Reports at page 322. The place at which I wish to read is at page 338.

LORD ATKINSON: Lord Watson had said that was one of these things that is included in section 92 which swells out and extends, but it is the thing that was in section 92, or a thing of that character; that is the thing that swells out and extends over the other parts of the Dominion, it is not a new thing in its nature, but it is the same thing that extends.

VISCOUNT HALDANE: The passage you have given us is in the argument of the Appellees at page 338.

Mr. DUNCAN: It is at page 348 I wish to read where your Lordship will see this. May I tell your Lordships what this case decided? It is a case under "the regulation of trade and commerce" clause, the clause which differed from ours in that it is confined to regulation of commerce between the States and with foreign nations, while ours is regulation of trade and commerce generally. Under that clause the United States Government passed an 8-hour day Act applicable



to federal railways, that is to say railways which pass between the States. There is no reference in the United States Constitution to railways, it was drawn up long before they were thought of, but the Supreme Court did hold that a railway fell within the regulation of trade and commerce, and the question then was: Where there is a difficulty with trade unions, acute difficulty, can Congress pass an Act saying, you shall have an 8-hour day, or whatever it was, in force on the railways, and they held by a majority, yes. Chief Justice White delivered the opinion of the Court, and in that case it was said that this is an emergency case, and it was most strongly contended that in emergency you may do anything, and he, giving the opinion of the court upholding the power of Congress, denied the emergency doctrine, and said that emergency cannot be made the source of power. He quoted *Ex parte Milligan* in 4, Wall at page 2, where it was distinctly held that emergency does not create power, and you cannot re-write the Constitution, and he goes on: "The proposition begs the question since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts, which if done, would interrupt, if not destroy, inter-State commerce may be by an anticipation legislatively prevented, by the same token, the power to regulate may be exercised to guard against the cessation of inter-State commerce threatened by a failure of employers and employees to agree as to the standard wages, such standard being an essential pre-requisite to the uninterrupted flow of inter-State commerce".

VISCOUNT HALDANE: We cannot follow this unless you tell us what is the provision in the original Constitution of the United States relating to commerce.

MR. DUNCAN: It is section 8 of the Constitution: "The Congress shall have power sub-head 3 to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes".

VISCOUNT HALDANE: Now did not they hold that that gave power to fix hours, but not wages.

MR. DUNCAN: I do not think so.

VISCOUNT HALDANE: I thought they did.

MR. DUNCAN: I think the reasoning of the judgment which follows will show.

VISCOUNT HALDANE: This is the head note: "Viewed as an Act establishing an 8-hour day as the standard of service by employees the statute is clearly within the power of Congress under the Commerce clause. The power to establish an 8-hour day does not beget the power to fix wages". Now let us go on. I have the head note before me. "In an emergency arising from a nation wide dispute over wages between railway companies and their own train operatives in which a general strike, commercial paralysis and grave loss and suffering overhang the country because the disputants are unable to agree, Congress has power to prescribe a standard of minimum wages, not confiscatory in its effects but obligatory on both parties, to be in force for a reasonable time, in order that the calamity may be averted, and that opportunity may be afforded the contending parties to agree upon and substitute a standard of their own". Apparently that is not under the commerce clause, but under the inherent capacity of the Constitution.

MR. DUNCAN: If I may say so, I think it clearly appears from the judgment that it is under the commerce clause because they say that emergency does not give the power. That is at page 348.

VISCOUNT HALDANE: What I read was from the head note: "Viewed as an Act establishing an 8-hour day as the standard of service by employees the statute is clearly within the power of Congress under the commerce clause. The power to establish an 8-hour day does not beget the power to fix wages".

Mr. DUNCAN: They are independent.

VISCOUNT HALDANE: Then it goes on to say the emergency gives rise to the power to fix wages and it says this: "Where a particular subject lies within the commerce power the extent to which it may be regulated depends on its nature and the appropriateness of means. The business of common carriers by rail is in one aspect a public business because of the interest of society in its continued operation and rightful conduct, and this public interest gives rise to a public right of regulation to the full extent necessary to secure and protect it. Although emergency may not create power (*Ex parte Milligan* 4, Wall, page 2) it may afford reason for exerting a power already enjoyed".

Mr. DUNCAN: I think that is the ground on which it is put.

VISCOUNT HALDANE: "The Act above cited in substance and effect amounts to an exertion of the power of Congress, existing under the circumstances, to arbitrate compulsorily the dispute between the parties—a power susceptible of exercise by direct legislation as well as by enactment of other appropriate means for reaching the same result". Then it goes on: "The Act does not invade the private rights of employees since their right to demand wages according to their desire and to leave the employment individually or in concert if the demand is refused are not such as they might be if the employment were in private business, but are necessarily subject to limitations by Congress, the employment accepted being in a business charged with a public interest which Congress may regulate under the commerce power". There is a great deal in this, and I quite see why you cite it.

Mr. DUNCAN: Under the same head which in our constitution is "regulation of trade and commerce," which, if I may suggest to your Lordships, I think is the second case. If it is not the true logical head, it is peace, order and good government. I have another case in the Supreme Court of the United States decided by Chief Justice Taft in 1923, the *Pennsylvania Railroad Company v. The United States Railroad Labour Board* in 1923, 261 United States Reports at page 72. That was a case in which Congress in dealing with strikes on railroads which fall under the inter-State Commerce clause (although railroads are not the only things which fall under the inter-State Commerce clause) passed an Act similar to the Lemieux Act establishing a Board which should hear the parties and should publish a report, the conception being this, I take it, that in all democratic Governments what you must depend on in the last resort is not force but public opinion, public opinion may give you your force; I should perhaps put it this way, that it is not armed force or military, but public opinion brought to bear on parties saying: You are wrong, we have no sympathy with you, we are against you. It is another form of election, it is a fundamental conception in democratic Governments. The Act is not as strong as our Act. The case is not precisely our case, but the parties here brought an action to prevent the Board publishing its Report; the Pennsylvania Railroad Company did not wish the report published. It went to the Supreme Court of the United States, and, in giving judgment, Chief Justice Taft said there was the power in Congress to say that they should publish such a report. It has to do with the regulation of trade and commerce, the conception being that it was not the regulation of a particular trade, or more than one trade, but that where you have power to regulate you have also the power to preserve. If you have power to regulate trade and commerce surely you have power to say: We will preserve trade and commerce from interruption by a strike. One does not need to go further and say that there may be sympathetic strikes which may end in a national emergency. Now those two, if I may say so, are in anticipation of my argument, and now may I return to the peace, order and good government clause? May I give your Lordship a proposition from the late lamented Mr. Lefroy in his last book?



LORD ATKINSON: If you are right section 91 is useless because peace, order and good government cover everything?

Mr. DUNCAN: No. May I just draw attention to the enumeration in section 91. It is for greater certainty only, but not so as to limit the generality of the foregoing and they go on and say in the last clause of section 91: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a *local or private nature*"—the phrase comes in again,—“comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces”. They give the central government the power of dealing with bankruptcy matters and insolvency matters, to legislate with respect to a particular insolvent company, to pick out a local and private matter and attach that to this general scheme of legislation because the Dominion conceives it necessary so to do. I suggest the distinction in legislating under the peace, order and good government clause is that as part of the enumeration you may not deal with a particular matter, and may not pass an Act, as my friend suggests dealing with a particular strike in a particular province, which is his argument, because that is local or private. You could only do that if that particular strike was of national concern, or threatened to be of national concern. That, I think, is, if I may suggest, the difference between the enumerations of section 91 and the residuum in section 91.

VISCOUNT HALDANE: I see very little in the *Pennsylvania* case bearing upon the question of the power of Congress. It is assumed apparently that there was the power and the discussion goes to this extent.

Mr. DUNCAN: May I read your Lordship a portion of that to which I intended later to come. I am reading on page 79 of the *Pennsylvania Railroad* case: "It is evident from a review of title 3 of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of inter-State commerce by labour disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties, failing that by reference to adjustment boards of the parties own choosing, and, if this is ineffective, by a full hearing before a national board appointed by the President, upon which are an equal number of representatives of the Carrier group, the Labour group, and the Public. The decisions of the Labour Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed flow of inter-State commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labour dispute, fasten public attention closely on all the circumstances of the controversy and arouse public criticism of the side thought to be at fault."

VISCOUNT HALDANE: The interesting question is not to discuss the motive, but the right of Congress to take this motive into account. Was it within the power of Congress under the United States Constitution to deal with this and, if so, how was it under commerce?

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: Does Chief Justice Taft say that anywhere?

Mr. DUNCAN: It is at page 84: "But title 3 was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them."

LORD ATKINSON: You quoted the exact words of the Act; what were the exact words?

Mr. DUNCAN: "The Congress shall have power to regulate commerce with foreign nations and among the several States and Indian Tribes."

LORD ATKINSON: To regulate commerce between two States must include the government of the machinery to transmit the commerce for instance.

Mr. DUNCAN: Our clause is stronger. We have the regulation of trade and commerce; they do not mention trade. We go further, and I will come to that.

VISCOUNT HALDANE: I do not think you can draw any inference from the use of "commerce" in the United States Constitution as to its use in section 91 of the British North America Act in a different context; it is among 27 or 28 headings.

LORD ATKINSON: It must involve the transfer from one State to another surely.

Mr. DUNCAN: I suggest not on their interpretation. Our clause, section 91, subsection (2) which is: "The regulation of trade and commerce" was, as I suggest to your Lordship, distinctly drawn up with the American clause in view, the idea being not to confine it to the troublesome matter of inter-State commerce only, but to give the Dominion, which is a trading State, not a military State, but a trading State and a commercial unit, the power to regulate trade and commerce, and what they said must depend on that which is in the second enumeration.

VISCOUNT HALDANE: I tell you my difficulty about your argument. When you began I thought you were going to cite decisions of the United States to show that notwithstanding the still more restricted powers of Congress compared with those of the Dominion Parliament still there had been held to be implied powers to deal with matters which concerned the national welfare and life, but when I come to the decisions you cite I find that they turned on the interpretation of the provision as to commerce and inter-State commerce between the American States. These words are there, but they cannot, as I was remarking, afford us much guidance as to the meaning of different words in the enumeration of section 92, the regulation of trade and commerce, because included in those are a multitude of other matters with a context that is different. You can only take the words as the framers of the Canadian Constitution took them, and you cannot get analogies from the words of a different Constitution.

Mr. DUNCAN: That is all in anticipation; the emergency point brought me to the first case.

VISCOUNT HALDANE: The emergency was all right, but when you parted with the emergency I began to find myself in stormy waters.

Mr. DUNCAN: That is my difficulty, whether it is emergency or whether there may be other cases in which the Dominion may legislate because it is for the national welfare.

VISCOUNT HALDANE: The other words come under the wording of the Constitution as construed by Chief Justice Taft.

LORD ATKINSON: In clause 10 of section 92 it gives to the province power to deal with: "Local works and undertakings other than such as are of the following classes: (a) Lines of steam or other ships, railways, canals."

Mr. DUNCAN: Within the province, and the Dominion has power to say that these shall be declared to be works for the general advantage of Canada and the Dominion wherever it seems necessity may take those out and put them under Dominion jurisdiction, the underlying conception being that it is control of trade.



LORD ATKINSON: "Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province." Under section 92 the provinces have exclusive cognizance of those things.

Mr. DUNCAN: Until the Dominion takes them away.

LORD ATKINSON: As long as they remain provinces there is no right to take them away.

Mr. DUNCAN: It is subsection (c).

LORD ATKINSON: That is the well known power that they have to declare any particular work a work for the benefit of the Dominion.

Mr. DUNCAN: And if the Dominion finds in its general control of trade and commerce throughout the Dominion because the peace and happiness and prosperity and welfare of the country depend on its fiscal system, and not only its customs bar, and development of wheat—

LORD ATKINSON: It was not to have different governors for different parts of the line, some Federal, and some under Dominion Governments, and some under the Provincial Governments; that would be impossible, and therefore they declared them works for the benefit of Canada, and then it was under the Dominion.

Mr. DUNCAN: There could not, under the British North America Act, be any portion of a line that was under the Dominion and another portion under the province. The province is given under section 10 jurisdiction over local works and undertakings, it is not given power over: "Lines of steam, or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits"—that is (A)—nor is it given jurisdiction over "Lines of steamships between the province and any British or foreign country"—that is (B), nor is it given jurisdiction over "Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces"—that is (C). Once it is for the general advantage of Canada, or of two or more provinces, it is, as I suggest, no longer a provincial concern, and the Dominion is given power under this section to say: This is for the general advantage of two provinces, and therefore, we must take it under our jurisdiction. I submit, with great respect, there is nothing under section 10, or any other portion of the Act, which gives portion of a railway partly to the Dominion and partly to the provinces.

LORD ATKINSON: Section 10 would have no power as far as that is concerned, it is only dealing with provincial matters; there is no power in the Provincial Government legislation to declare a thing for the benefit of Canada, it must be by the Dominion, it must be constructed in the province, that is to say, it is local work which falls within the province under section 10, but the Dominion has no power to declare part of a local work for the general advantage of Canada. If the province creates a work which extends beyond the boundary of the province automatically it comes under the Dominion under (A) because it extends beyond the boundary of the province. So that either it is a local work wholly situate within the province, and therefore under provincial jurisdiction, or it is a work extending beyond the province, and therefore by its very nature of Dominion concern, and under the Dominion jurisdiction under section 10, or, thirdly, it was originally a local work situate wholly within the province and is now declared to be for the general advantage of Canada, and therefore under the Dominion jurisdiction.

*(Adjourned for a short time.)*

LORD DUNEDIN: Is your proposition this: If it is a matter of national importance it would be ludicrous to suppose that you must wait until you have identical legislation in all the provinces to deal with it, and, therefore, you must have recourse to the Dominion, and, secondly, when you come to what is a question of general importance it is really proof that it is of general importance that the Dominion Parliament, which is composed of people from all the provinces, has dealt with it?

Mr. DUNCAN: That is not precisely my argument. In the first place, I do not put it on the ground that it is outrageous to suppose that one should wait until there has been collective action. I put it on the ground that the jurisdiction is given to legislate for peace, order and good government in all matters of national concern, but that section 92 only covers those matters of provincial concern, and it was a conclusion that I was giving to your Lordships, not so much an argument, that if the other conception prevails, then you do have the British North America Act so interpreted that you must wait for collective action from each of the provinces.

LORD DUNEDIN: Do you say the fact that the Dominion has so treated it is proof to a certain extent that it is a matter of national importance?

Mr. DUNCAN: What is the test to be applied to legislation ostensibly passed under the peace, order and good government clause? May I, before dealing with that, give one short reference to your Lordships. The reference is to Mr. Lefroy's Canadian Federal System, Proposition 34. I do not say this carries me all the way, but it is a conception which I wish to emphasize. "Before the laws enacted by the Federal authority within the scope of its powers the provincial lines disappear. As to these laws we have a quasi legislative union. They are the local laws of the whole Dominion and of each and every province thereof." That proposition is supported by his text at pages 123 to 127, and among other cases to which he refers is the case of the *Grand Trunk Railway Company of Canada v. The Attorney General of Canada*, in 1907 Appeal Cases, which was the case decided by Lord Dunedin. It was a railway case, and had to do with what was really legislation ancillary to the railway legislation, and the conception that the Court had there was that, if it was reasonably ancillary, you had a legislative union and the central power had sufficient authority to deal with all matters properly relevant to the subject.

VISCOUNT HALDANE: Railways are given exclusively to the Government of Canada.

Mr. DUNCAN: Yes, but this legislation as to contracting out might well have been looked at from the point of view of property and civil rights, but the conception that in matters within Dominion concern, whether under peace, order and good government, or under an enumeration, there is legislative union and Canada is one State and not a congeries of provinces which have to come together to pass legislation. There is another case which followed on that, and, without quarrelling with the decision in the case at all, it has been looked on in Canada as the case in which one first sees the suggestion of co-operation. That was the through traffic case, *The City of Montreal v. The Montreal Street Railway*, reported in 1912 Appeal Cases, in which the question was this: Through traffic which originates on a provincial line and goes on to a Dominion line falls within the legislative jurisdiction of the Parliament of Canada dealing with federal railways, and your Lordships held that there was nothing to show that through traffic had attained such proportions as to affect the Dominion, and, therefore, your Lordships suggested that there was nothing to show that there would not be co-operation between the provincial legislatures and the Dominion legislature to deal with this particular matter. I do not know, it has been thought in Canada, that the case in 1907 Appeal Cases, on the one hand, and the case in 1912 Appeal Cases, on the other, illustrate these different



tendencies. Personally, if I may respectfully say so, I do not think so. Through traffic is so small a matter that there is no moving away from the principle laid down in the case in 1907 Appeal Cases that matters such as railways fall within Dominion property. I submit to your Lordships that there are four possible tests, which have been put forward in this case, which need to be applied to determine whether legislation passed ostensibly under peace, order and good government is, in fact, within the jurisdiction of the Dominion. The first conception is that to be found in the judgments of Chief Justice Strong, Mr. Justice Taschereau and those Judges who were close to confederation, and also in *Russell v. The Queen*. May I put, as shortly as I can, what would seem to be the decision in *Russell v. The Queen*. Shortly it falls into two heads: first, is the legislation in its proper aspect legislation for the peace, order and good government of Canada and so not legislation in relation to property and civil rights; are those words in relation to one aspect? That is the first question: Is it legislation for the peace, order and good government of Canada? I will come to the question of interference in a moment, and I will lay stress on the difference between interference and aspect, the difference between that which interferes with a civil right and that which is legislation about or *qua* a civil right. Secondly, in *Russell v. The Queen* it seems to have been suggested, as perhaps follows from the judgment, that, if so, we are not concerned with any question of evidence as to the actual conditions in Canada at all; that is to say, it is not quantitative, but it is qualitative.

LORD ATKINSON: If the Dominion Parliament chooses to legislate for the whole of Canada, that must be right, because they have said so?

Mr. DUNCAN: No, my Lord, that is not my argument. I am sorry that I have not made myself clear. My point is that the Board, looking at a statute, says: Can this statute be said to be a law for the peace, order and good government of Canada? That is the test that this Board applied in *Russell v. The Queen*. Is it peace, order and good government; does it deal with public wrongs, or does it deal with civil rights? I cannot say we have legislated, and, therefore, it is right. The Board has to determine whether the legislation can possibly be classed as legislation for the peace, order and good government, and, if it is, in its aspect and purpose, or, as the cases say, in its pith and substance, in relation to peace, order and good government, very well, that is what it is. If, on the other hand, it is in relation to property and civil rights, then it fails, and the Board will say so. May I give an example of the legislation in this way? Supposing Parliament says that the succession in the case of infants shall always be to the second son, how could it possibly be for peace, order and good government? It cannot be. It is in relation to property and civil rights. That is the test of *Russell v. The Queen*, and they are not concerned with questions of evidence, if the legislation bears that aspect. Those are questions for statesmen, for the Parliament of Canada.

LORD ATKINSON: If it bears that aspect in the eyes of whom?

Mr. DUNCAN: In the eyes of this Board. The Board must say: Is it legislation of that kind; can it be classed as legislation for peace, order and good government; if it is in that aspect, and not in relation to property and civil rights, then the Board is not concerned with questions of evidence. If it were concerned with that, what would be the result? Every litigant who had raised against him the allegation that this was *ultra vires* the Parliament of Canada would have to produce before the Board all the evidence that was before the Cabinet, when it made its decision, and the House of Commons and the Senate, of the actual conditions of Canada before your Lordships would be able to pass on that question.

LORD ATKINSON: Why should they be obliged to produce all the evidence that was before the legislature? If they produce evidence enough to show to the Tribunal that is deciding it, is not that sufficient?

MR. DUNCAN: Yes, my Lord, the litigant would have to do that. It would follow from that decision that the Board is not concerned with evidence, although the legislation bears the aspect of peace, order and good government.

LORD DUNEDIN: I have great difficulty in going with you there, because what we have to look at, as being either legislation for peace, order and good government primarily, or being legislation for civil rights primarily, is the Act of the Canadian Parliament.

MR. DUNCAN: Yes.

LORD DUNEDIN: That is a question of the construction of the Act?

MR. DUNCAN: Yes.

LORD DUNEDIN: It is surely a very tall order to say that we are to come to the conclusion as to what is the proper meaning of an Act by taking evidence upon the state of circumstances at the passing of the Act.

MR. DUNCAN: I was not putting my case in that way; I was trying to answer the objection. I say that in *Russell v. The Queen* the board appears to have said: We can construe this Act as one in relation to peace, order and good government.

LORD DUNEDIN: Certainly.

MR. DUNCAN: We are not concerned with evidence.

LORD DUNEDIN: The board came to the conclusion upon what they thought of the Act as it was before them; they did not hear any evidence in *Russell v. The Queen*.

MR. DUNCAN: No, my Lord, I am not suggesting that they did. What I mentioned evidence for was in reply to Lord Atkinson. He said: Are we not concerned with the conditions?, and I said: In *Russell v. The Queen* that was not so.

LORD DUNEDIN: Lord Atkinson's question was a very natural one, if I may say so: Who is to decide; is it the Parliament of Canada or is it us? You submit that it is for us to decide?

MR. DUNCAN: Yes.

LORD DUNEDIN: Then you say in order to show that it was good, *prima facie* it was because the Canadian Parliament had said so, and, in order to get out of that, it would be for the other side to lead evidence?

MR. DUNCAN: I did not mean to say that.

LORD DUNEDIN: I do not see at present how evidence would have anything to do with our determination of the question as to whether the primary object of the legislation was one thing or the other.

MR. DUNCAN: That is my submission, that under *Russell v. The Queen* evidence has nothing to do with it. I mentioned evidence in this connection. I said: If you must produce evidence, then what follows; first the inconvenience to litigants to gather up evidence from all parts of Canada; the impossibility that they can gather it up completely and the fact that the board will then be sitting in judgment on the Parliament of Canada on a question of fact as to which the board has not all the materials before them, so that only is an argument on inconvenience from the other rule. I suggest that *Russell v. The Queen* goes on the first rule: What is the object of the legislation?

LORD ATKINSON: Supposing you have a statement of the Dominion: Whereas such and such a thing prevails, and whereas we deem it a thing that affects the peace, order and good government of Canada, and whereas in the exercise of our powers we legislate so and so; when that came up before this board are we estopped from listening to evidence to show that the thing particularly put forward as the justification for the Act did not exist?

MR. DUNCAN: I think under *Russell v. The Queen*, yes.



LORD ATKINSON: You say we would be excluded under *Russell v. The Queen*, if they affirmed that the matter was a matter affecting the peace, order and good government of Canada, and in exercise of the powers conferred upon them, under the first head, for dealing with such matters, they executed so and so, could not evidence be adduced here to show that the thing they stated to exist did not exist?

MR. DUNCAN: For the purpose of this case, I would be prepared to say, Yes. Your Lordship is asking for a general principle?

LORD ATKINSON: I want to get hold of the principle that you are contending for. Does the fact that they promote the legislation under the powers of this section, on the ground that what they propose to do is for the peace, order and good government of Canada, shut out every enquiry, and, when the case comes up for consideration, are we to say: We have nothing to do with it; the legislature is the final judge; it has put in print in the statute that this affects the peace, order and good government of Canada, and we, in pursuance of our powers, because we think it does, do so and so?

MR. DUNCAN: I think, in looking for the true principle, evidence might possibly be adduced to show that the object of the legislature was not peace, order and good government, but that it was colourable legislation.

LORD ATKINSON: That it was corrupt?

MR. DUNCAN: No, colourable; an attempt to do indirectly what it could not do directly, as in the insurance case; that is all. In that case evidence would have no bearing on the question at all if that allegation was set up. I do not think any court would exclude parties who came forward.

LORD ATKINSON: That is, they could not do directly what they purport to do?

MR. DUNCAN: If, in fact, they were legislating for peace, order and good government. I do not think any argument would bind this board; it would be the nature of the Act itself, and whether in all the circumstances it was capable of being legislation for peace, order and good government.

LORD DUNEDIN: You stated what you considered to be the first test, namely, what is the object of the legislation. You have several times referred to what you call the second, but you have never told us what the second was.

VISCOUNT HALDANE: Mr. Duncan did tell us what was the second by quoting *Lefroy*.

MR. DUNCAN: No, my Lord, that was before I began on this. I say that, in testing legislation under peace, order and good government, there are four possible tests I put forward to your Lordships. The first is under *Russell v. The Queen*, these two heads: first, Is the legislation, in its proper aspect, for peace, order and good government, or is it in relation to civil rights in the province, and, secondly, if it is for peace, order and good government we are not concerned with the evidence of the actual conditions in Canada.

LORD ATKINSON: If it appears to be for the peace, order and good government, you say the enquiry is estopped?

MR. DUNCAN: No, not if in a recital it appears, but if, on examining the nature of the Act, it appears.

LORD ATKINSON: Not a recital alone?

MR. DUNCAN: But if, in its true nature, judicially construed, then evidence is immaterial, unless it is suggested on the other side that this is colourable legislation, that it was not truly for peace, order and good government, but was an attempt to legislate with respect to succession of second sons, for example. The second test comes from the *Attorney General of Ontario v. The Attorney General of Canada*, reported in 1896 Appeal Cases. I am not sure that this does introduce another rule, the question of the quantitative as distinguished from

the other, but it can perhaps be put on the other side. May I read from the middle of page 360: "The general authority given to the Canadian Parliament by the introductory enactments of section 91 is 'to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subject by this Act assigned exclusively to the legislatures of the provinces'; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate,"—I submit that the residuum is there—because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by the concluding words of section 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91, would, in their Lordships' opinion, not only be contrary to the intentment of the Act, but would practically destroy the autonomy of the provinces." That is a most important sentence. May I direct your Lordships' attention principally to the word "assumption". "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of private or local interest, upon the assumption"—"upon the assumption" I submit means upon the assumption without evidence being tendered, or without its appearing *aliunde* that it is of general national concern—"that these matters also concern, the peace, order, and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures."

VISCOUNT HALDANE: That is not on the assumption, conceding it to be valid, that in law these matters refer to peace, order and good government of the Dominion. That will not do. Does not he mean that as a matter of evidence these things are concerned with the peace, order and good government of Canada? There are many things in section 92 that do not concern the peace, order and good government of Canada.

Mr. DUNCAN: Which one would your Lordship take?

VISCOUNT HALDANE: Property and civil rights, which is a most important Dominion subject.

Mr. DUNCAN: Property and civil rights in the Province?

VISCOUNT HALDANE: Yes.

Mr. DUNCAN: I say if this is legislation with regard to property and civil rights in any province there is no general Dominion interest, and then it is excluded.

VISCOUNT HALDANE: Property and civil rights in all the provinces may be a matter of Dominion importance.

Mr. DUNCAN: Collective action by the legislatures?



VISCOUNT HALDANE: No, on the contrary the theory when the constitution of Canada was agreed on in 1867 was that the provinces should be autonomous places as if they were autonomous Dominions. The Lieutenant-Governor is the direct representative of the Crown, and the legislature has direct authority from the Imperial Parliament.

Mr. DUNCAN: Within the provincial sphere, not a state sphere.

VISCOUNT HALDANE: You have to look to the heads of section 92. It is within those spheres in each province.

Mr. DUNCAN: My difficulty is to discover where there is any residuum at all. In what matters can the Dominion legislate without interfering with property and civil rights?

VISCOUNT HALDANE: Section 91 gives you a number of things.

Mr. DUNCAN: Does our constitution come down to the enumerations of section 91, the enumerations of section 92, and nothing else?

VISCOUNT HALDANE: When there is nothing provided for in one or the other, then the words peace, order and good government at the beginning of section 91 come in.

Mr. DUNCAN: May I put my difficulty to your Lordship. It is a genuine difficulty. If so, what legislation could possibly be passed by the Dominion which does not interfere with property or the civil right of the inhabitant of the provinces to do as he pleases? Could you pass any legislation which less interferes than this Act, which says: We will set up a Board to enquire and the Board may make its report? The only thing that is in issue here is the ancillary provision which gives the Board power to summon witnesses to get at the facts, so that its opinion may carry weight with the public.

VISCOUNT HALDANE: And to stop the business, to stop the strike.

Mr. DUNCAN: That is not in issue here; that is another case altogether. The injunction was granted, and the case proceeds on the ground that the Board would probably have summoned witnesses. The only question here is whether you may give ancillary powers to a Board of enquiry established to investigate a matter which the Parliament of Canada thinks is for the peace, order and good government of Canada to get at the facts.

LORD ATKINSON: Must not you take into consideration all the powers which they have?

Mr. DUNCAN: I contend not in this case, not, I say, in this particular case that comes to your Lordships. Under the other sections people have been convicted and sent to gaol for striking and inciting to strike, while the Board was sitting, and endeavouring to inflame public opinion, but the only case before your Lordships is whether a Royal Commission being appointed, it can for the peace, order and good government inquire into matters which are not enumerated in section 91, and can summon witnesses to get at the facts.

VISCOUNT HALDANE: So far as the mere inquiry is concerned without the power to summon witnesses and put them on oath, the Executive Government of Canada might have instituted such an inquiry. They would only have to set up a Committee; that is not legislation; that is an Executive act. That would not be interfering with the civil rights of the public in the province.

Mr. DUNCAN: Is that the kind of civil right which is given to the province? Does not the Act do this. It says that the province has power to legislate with respect to civil rights, but it does not say that the Dominion cannot impose duties on Dominion citizens. The Dominion surely can impose duties on the citizens of the Dominion, and duties are not civil rights.

LORD ATKINSON: And if a man is taken up by a policeman by the authority of someone which is not valid, is not that interfering with the civil right, because the civil right is not to be taken up.

Mr. DUNCAN: He has a civil right.

VISCOUNT HALDANE: He has a civil right to liberty. The essence of the English common law is the right to liberty unless some process of the Court interferes with it. Are you not interfering with it in the case which Lord Atkinson has given?

Mr. DUNCAN: With all respect I submit that in peace, order and good government you must draw a distinction as they did in the Russell case between civil rights and public wrongs.

LORD ATKINSON: But that is an entirely different thing. It is acting in the interests of the State as a whole not to alter any person's civil rights.

Mr. DUNCAN: Yes.

LORD ATKINSON: Lord Watson points out in one case that there are scarcely any of these things in section 92 which upon that principle could not be fairly contended to interfere with peace, order and good government. He gives for instance solvency, Municipal Institutions, taxation, and solemnization of marriage, which are all things that affect peace, order and good government.

Mr. DUNCAN: Yes, they may have been excluded, and those are all within the province.

LORD ATKINSON: It means that you could effect the same object for peace, order and good government, and practically invade the powers of the provinces.

Mr. DUNCAN: May I just complete the citation at page 361; the judgment continues: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion." It suggests that that amounts to emergency. "But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion."

LORD ATKINSON: He is dealing with the particular things which are primarily merely concerned with the province and which expand into some-  
be competent dealt with by the Parliament of the Dominion."

Mr. DUNCAN: Yes. Is not the point here that they find liquor legislation to be in respect to matters local and private?

VISCOUNT HALDANE: What he says at page 361 is: "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures."

Mr. DUNCAN: Is not the difference between that and the Russell case that he says you must have evidence. In the Russell case it was suggested that you must examine the nature and extent of the legislation, and if it does bear the aspect of peace, order and good government, we are not concerned with evidence. In this case he suggests it must not be assumed.



LORD ATKINSON: Almost everything could fairly be brought within the head of peace, order and good government.

Mr. DUNCAN: Then his test is a correct one. Must not you look at the facts and ascertain whether it is capable of being and in fact is for the peace, order and good government of the Dominion.

LORD ATKINSON: What the policeman tells you to do to avoid the traffic in crossing the street is all connected with good government surely?

Mr. DUNCAN: Yes, then what is the test in the case of 1896 Appeal Cases. Is it not that all these might be laws passed under the authority of Russell v. The Queen. We say: no, you must use great care in distinguishing that which was originally local and provincial from what is Dominion.

LORD ATKINSON: The statute excludes you from legislating with regard to those things under section 92 however much your legislation might be under the head of peace, order, and good government. You cannot attack them under the pretence that you are legislating for peace, order, and good government; the statute prohibits you from doing that; it says you must not do it.

Mr. DUNCAN: It does with respect to the first 15 enumerations, but not with regard to the 16th. The 16th is matters local and private, and they said in the Manitoba Licence Holders case that legislating with regard to drink did not fall under property and civil rights, but under head 16, matters local and private. I say it is exactly the same thing here. If the province was passing a Trade Disputes Investigation Act, it could pass it under section 92 head 16, because in its true aspect it would be legislation in respect of matters local and private in the province, not property and civil rights. I think it is clear from the cases that if it was originally under section 92, head 16, which is generally matters of a merely local or private nature in the province, if it becomes of Dominion concern it transcends that enumeration and passes into the peace, order, and good government section. There is a great distinction between section 92, head 16, and the other enumerations, because their Lordships say in one case the section 92, head 16, appears to them to bear the same relation to the other enumerations of section 92 that the peace, order, and good government clause does to the enumerations of section 91; that it is the general one. If you examine what is here being dealt with, it is something that would fall under section 92, head 16. If the provinces pass a Trades Disputes Act, with which the Dominion has no quarrel whatever, the provinces would pass such a Trades Disputes Act under section 92, head 16, because of only Provincial concern. Such would have been the case in 1900 before the unions became highly organized, or before the labour unions extended all over the Dominion, and were controlled from the United States, and in some cases from Russia. Now by reason of the organization of the trade unions, they are no longer of provincial concern only, because the whole texture of labour is such that a strike in one province may at any moment cause a sympathetic strike in any province.

LORD ATKINSON: I think you have what Lord Watson said in that case in your favour, that matters which are *prima facie* Provincial may so extend in area or position, and so on, as to become Dominion matters.

Mr. DUNCAN: Is not it important that he uses the words "matters local and private"? He does not say property and civil rights may extend to a matter of national concern, he says "matters local and provincial in their origin may attain such dimensions as to affect the body politic of the Dominion," and in another place he says local and private. "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest." He is referring to section 92, No. 16, saying that a local regulation would fall under section 92, No. 16, as was subsequently held in the Manitoba Liquor case, that it was not property and civil rights that were being

dealt with. I suggest it is not property and civil rights which this regulation is dealing with, it is a dispute and a threatened industrial disturbance.

LORD ATKINSON: He is only giving a definition of a provincial thing which swells into a national thing.

Mr. DUNCAN: Possibly; that is referring to all the enumerations in section 92.

LORD ATKINSON: He said afterwards none of them could be overborne by the application of the principle of "peace, order and good government."

Mr. DUNCAN: If he stops there, that property and civil rights in the province may attain national dimensions justifying legislation by the Dominion, I put a stronger case, where it is not property and civil rights, but originally a local and private matter in the province, such as regulating a trade dispute. The necessity or the evidence required to take it out of section 92, No. 16, is far less than required to take it out of section 92, No. 13, "property and civil rights." That was the second test that was possible; first *Russell v. The Queen*, then 1896 Appeal Cases, and the third test I suggest to your Lordships is the emergency test, which my friends rely on here, and the difficulty with that is that it is not mentioned in the Act, and I suggest that the reading of sections 91 and 92 enables one to arrive at the true conclusion without resorting to an emergency, or putting a construction on the Act which requires an emergency.

VISCOUNT HALDANE: There was no emergency when the Act was passed, there was a certain amount of unrest or disturbance, but it was anticipation merely.

Mr. DUNCAN: The Act was passed under these circumstances. In 1906, the coal miners in the province of Alberta went on strike. Winter was approaching, and the inhabitants of the province of Saskatchewan and also British Columbia depend on the coal which comes from Alberta. The Government of Alberta were unable to do anything, or did not do anything, and the result was that the Dominion Government were being asked, and more or less urgently being asked, by the governments of the adjoining provinces to come to their aid, because Saskatchewan could not possibly deal with the Alberta strike, which was not being dealt with, nor British Columbia. The people were without coal, and winter in the western provinces is of extreme rigour, where there are in many cases 60 degrees of frost, below zero, and it was a matter of acute importance. Mr. Mackenzie King—

VISCOUNT HALDANE: The Minister of Labour?

Mr. DUNCAN: No, he was Deputy Minister. He went out and managed himself, as a Dominion representative, to bring about a settlement, and the miners went back to work, and coal was supplied to people who were liable to have been absolutely frozen out, and would have had to migrate to other parts if this had not been done. That was in 1907. At that time there was on the Statute Book the Statute of 1900, which was the Conciliation and Labour Act, and is printed in the appendix here. It was not effective, and the Dominion Government, seeing the necessity, drew up this particular Act to deal with that situation.

VISCOUNT HALDANE: Will you tell me one thing; I have noticed there is an Act of 1906, and there is an Act of 1907; are they the same?

Mr. DUNCAN: No, my Lord, the Statute of 1906 is of the Revised Statutes of 1906; it was originally passed in 1900, and is called the Conciliation and Labour Act, and the Act now under discussion was first passed in 1907.

VISCOUNT HALDANE: I did not notice much difference between the two.

Mr. DUNCAN: There is a material difference; in the first place the parties are not allowed to strike under the later Act.



VISCOUNT HALDANE: That was introduced for the first time under the later Act?

Mr. DUNCAN: Yes, because of what happened in Alberta. The principle is that, in matters of vital interest to the community, these people may not strike until there has been an attempt made to bring them together by conciliation. It was in fact on that, as I suggest to your Lordship, that this Act was necessary—acute situation, not emergency such as war, but such as might arise at any time in Canada, where the provincial boundary lines are not even geographical, they are merely an imaginary straight line, they do not follow a river, and there is no economic division between the provinces, each province is absolutely dependent on the other provinces in many cases for means of livelihood and everything like that; that is the economic situation. You must, I suggest, have a central control. If I may give an illustration, just before coming over here I happened to be in the coal district where this dispute arose. The men had gone out on strike again after having had a board. Some of the mines in which the strike was going on were just across the imaginary border line of British Columbia, the remainder of the mines are in Alberta. If you had two separate boards dealing with the danger from the United Mine Workers of America, No. 18 (which is made a district because of the descriptions of mines and because the mines are there) you would have two separate boards, because of this provincial artificial boundary line, which might not bring in the same recommendations and might prolong the strike. I suggest it is impossible in economic things like this, where conditions are in that economic state, to say: We must leave these things to the province. It was because of that emergency in 1907 that this Act was passed by the present Prime Minister, or drafted by the present Prime Minister, at the instance of Mr. Lemieux, then Postmaster General from the Province of Quebec, the province most vigilant of all to uphold provincial rights. Now we come to the test. Under the *Russell v. The Queen* test, is this legislation directed to “peace, order and good government”, or is it directed to “property and civil rights”? It is not the latter. If anything in section 92 it is dealing with a matter which was local and private at first, and, as I suggest, has transcended local and private and passed into section 91. Then the second test is the 1896 Appeal Cases. I suggest on that too we succeed. The next test is emergency. Now what else could you have in the way of emergency? I propose in a moment to deal with the evidence on that point, both the emergency then and the emergency in 1923. This is what happened in 1923. The Department of Labour had not in the past been applying this Act to municipalities if they objected. It said: We will leave it alone, there may be rejection, there may not; we will not be bothered with it. In this particular case, the steel workers of Nova Scotia went out on strike, the employees of the British Empire Steel Corporation. They are outside the Act. I suggest to your Lordship, if there is jurisdiction it is jurisdiction to cover all the employees because of the texture of labour, it runs all through, but they happened for the moment to be outside. They struck, and the situation was acute. The coal miners of the British Empire Steel Corporation also struck in sympathy. Application was made at once by the local authorities for the militia, because they were afraid of the situation. Troops were drafted from all over Nova Scotia and the surrounding military district; they were not sufficient. The local officer there, who has nothing to do with politics, he is an officer of the Permanent Force, requisitioned for more troops, and more and more troops were sent to that area, until every available man of the Permanent Militia of Canada was in Nova Scotia, from as far west as Winnipeg, over 1,000 miles to the west of Toronto; so that Toronto was standing there without troops at all, they were all in Nova Scotia. The Government at that time was receiving telegrams and other com-

munications from labour unions all over Canada protesting against the movement of troops, and threatening strikes in other parts of Canada. A threat was made by the United Mine Workers of America, District 18, that is, in Alberta; they actually went on strike because of that, and the telegram threatening it is in evidence here. There were other people and other unions, many of them also protesting at that time, and in those circumstances this application was made for the appointment of a board. The Minister was reluctant. The dispute, however, had been of long standing, over a year, the men had made application to the Provincial Government for the appointment of a board under the Trades Disputes Act, and the then Minister of Labour, Mr. Rollo, wrote back and said: We are not sure whether they are under our jurisdiction, we have not used our Act for many years, I do not know of any example, and I will consider it, and nothing was done. The dispute was critical. The leader of the dispute, a man called Gunn, who was called here as the first witness, was a known agitator, the only man who has ever successfully engineered a police strike in Toronto, a man who, a little time before that, dealing with similar employees, electrical employees, had engineered a strike of the tramway employees at the time the exhibition was on, when over 100,000 people, including women and children, were in the exhibition, and they had all to walk home at great inconvenience. He was a ruthless agitator. This application came on before the Minister at that time, and in view of the critical situation existing in other parts of Canada, all the troops being down there, labour being very much agitated, and particularly in view of what the Minister knew of the then mind of labour—he is a labour man himself, and he knew about the Winnipeg general strike, which was a strike at the very existence of Canada, engineered by the Communist and Soviet people and very nearly successful at one time—he appointed this board. I suggest on the question of the emergency, if it is necessary it is there. I say emergency is inherent in the situation because of class feeling, and you never can tell with a strike, however innocent-looking it may be, that it will not spread to other parts of Canada. The Winnipeg strike started in the most innocent way, among a few people in a little concern in Winnipeg, and within a week it had spread to other parts of Canada and was a general strike. If emergency is necessary, I suggest to your Lordship it is there, but I submit that emergency always is inherent in this matter because of the labour unions being all over Canada, controlled in many cases outside Canada, and what Government other than the Canadian Government can deal with the situation? It is not as if it were the alteration of a civil right here and there that is being discussed, it is the question of a large group of citizens liable at any moment, irrespective of the provincial boundaries, to take action.

Now the fourth test that is before your Lordship I submit is the test which my learned friends have suggested, that of interference. They say: Does this law interfere with any of the enumerations in section 92? If this is the true test, the curious result follows that the greater the interference the less the possibility of it being for peace, order and good government. The suggestion was made by my friend that interference on such a scale as this brings it outside the Act, it is a grievous interference with the right of persons to refuse to give evidence and so on, the interference is very great. Is interference the test? I suggest to your Lordships that the only possible test is the one used in many cases and founded on the words of the statute, the aspect of the legislation. It is not, Does it *interfere with it*, but is it *in relation to property and civil rights*?

LORD ATKINSON: The aspect of the legislation?

MR. DUNCAN: The aspect of the legislation.

VISCOUNT HALDANE: You say that is the test?



Mr. DUNCAN: I say that is the test in many cases; it is in all four liquor cases, it is in the railway cases, and it is founded on the words of the Statute which give the Provinces jurisdiction—

LORD ATKINSON: You must mean by “aspect” what it purports to have been designed to do or intended to do.

Mr. DUNCAN: Yes, what is its object and substance, what is it dealing with, is it dealing with property and civil rights. Now that is founded on the words of the Act, both section 91 and section 92. In section 92 it says; “In each Province the Legislature may exclusively make laws *in relation to* matters coming within the classes of subjects hereinafter mentioned”.

LORD DUNEDIN: I do not quite follow you here; I do not follow how this can be a test.

Mr. DUNCAN: Interference.

LORD DUNEDIN: I understand your first proposition, as to what should be a test, but I cannot conceive any Dominion legislation which, if it is coercive at all, is not an interference with civil rights, and therefore, if that is so, I do not see how interference can be a test.

Mr. DUNCAN: That is exactly my point. I say my friends have put that forward as a test, and I say it cannot possibly be a test.

LORD DUNEDIN: Then that is all right.

Mr. DUNCAN: I say that cannot be a test. I say one cannot conceive of any legislation which does not interfere either with property and civil rights, or rights in some other enumeration. On the construction of section 92, it has been clearly laid down by this board that no provincial legislation can fall within more than one of the enumerations, that is to say that the enumerations in section 92 are mutually exclusive.

LORD DUNEDIN: Pardon me, I understand you put it that is a bad test as put by the other people, but the first test you gave is a test put by yourself, not by them; the first test is, you look at the legislation; remember it is you that have to put forward the test. Indubitably this legislation does not interfere with some rights, and, so to speak, begins with the question of being provincial legislation. Then you have got to rise it to the Dominion legislation under “peace, order and good government.” I quite understand you put that test and saying the real test is the question as to the power over civil rights and peace, order and good government. That is the test in your mind and not theirs. In one sense you are rather shifting ground when you come to the test which is proposed by them, which you then say is bad.

Mr. DUNCAN: I wanted to cover all possible tests.

LORD DUNEDIN: Emergency I can understand; that is the Great War. I am very sorry, but your second point has always been elusive to me; I do not understand what the second point is.

Mr. DUNCAN: The one under 1896 Appeal Cases, which introduced the question of evidence. The way I put it is this, *Russell v. The Queen* says you must, to use a French word, look at the *but* of the legislation, and we are not concerned with evidence. 1896 Appeal Cases said it must not be assumed that any law which the Dominion Legislature establishes for peace, order and good government is of that class.

LORD ATKINSON: That is not what it says; it says, if you assume this for the purpose of the argument, every one of the things enumerated in section 92 must be dealt with as the regulation of peace, order and good government.

Mr. DUNCAN: The second test, I suggest, is 1896 Appeal Cases, which says you may look at evidence to see whether the matter originally local or private has reached Dominion dimensions.

LORD ATKINSON: Has extended into section 91.

Mr. DUNCAN: Yes. That is the second, and that is the beginning of the emergency doctrine, because, as put in 1896 Appeal Cases, it was not an emergency; I suggest it was: Does it affect the body politic, is it traffic in arms under such circumstances as to raise a suspicion that they may be used against a foreign state? Then the third test is emergency, and the fourth test I reject, with all deference to my learned friends. If I were asked to put the test I should say this, the first test is the *but*, and the second test is, is there any evidence of actual conditions showing that that was not the true *but*?

LORD ATKINSON: The true *but* of the legislation?

Mr. DUNCAN: The true object and so on.

LORD ATKINSON: Is that repealed by the terms of the Act they passed?

Mr. DUNCAN: By the terms of the Act if there is no evidence to the contrary. Just as showing that it cannot possibly be that interference is the test, that is not the phraseology of the Act, it does not say: We give to the Provincial Legislature sovereign powers over all kinds of property and civil rights and you must not interfere with them. The test is, is it in *relation to* property and civil rights. May I refer your Lordships to 1896 Appeal Cases, at page 365. There your Lordships see: "It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads," it is not necessary to determine whether it is 13 or 16. "It cannot in their Lordships' opinion be logically held to fall within both of them." Then in the *Attorney-General for Manitoba v The Manitoba License Holders' Association*, in 1902 Appeal Cases, your Lordships will see at page 78, "Although this particular question was then left apparently undecided," that is whether local legislation falls within section 92, No. 13, or section 92, No. 16—"a careful perusal of the judgment leads to the conclusion that, in the opinion of the board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion. In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of local evil, rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with 'property and civil rights in the province.' Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter." On the point Lord Atkinson made, if it is 92 No. 13, it could never become a Dominion concern.

VISCOUNT HALDANE: What is troubling me throughout is that, looking at this, it seems to me clear that the province could have passed it; it was within the competency of the province.

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: The only thing left in it is, only one province has passed it.

Mr. DUNCAN: Four provinces have passed it.

VISCOUNT HALDANE: One province has passed it for Ontario, four provinces may have passed it.

Mr. DUNCAN: Yes. Five provinces passed it. British Columbia repealed it by the Obsolete Statutes Act. Manitoba has no appropriation for it this year. In Quebec it has been held not *ultra vires* but the Dominion Act held *intra vires*, and the only remaining province, Nova Scotia, passed it in 1923, and, I am informed, there have been no applications under the Act in Ontario.



and the evidence shows that the Act is not applied, is not used, and no application has been made for many years.

VISCOUNT HALDANE: Nor under the Dominion Act until the present time.

Mr. DUNCAN: With respect, applications were made.

VISCOUNT HALDANE: For the board?

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: But only as regards this particular principle, this is the only case.

Mr. DUNCAN: No, the Act has been constantly applied at other times, and there have been one or two other cases in municipalities in which it has been applied without consent, but generally the practice of the Department was not to apply it to municipalities without consent. It has been applied in hundreds of cases other than the cases of municipalities within Ontario and within all the other provinces.

VISCOUNT HALDANE: Miners and railwaymen?

Mr. DUNCAN: Yes, those within the purview of the Statute, but in Ontario in many cases since 1907; some hundreds of cases have been dealt with under the Act all over Canada as the evidence shows. I might be indeed driven to this—I am not using “driven” in any terrified sense—we must show that it falls not under 92, No. 13, but under 92, No. 16, a Provincial Act under 92, No. 16.

VISCOUNT HALDANE: Why not under section 92, No. 13?

Mr. DUNCAN: Because it is so much easier under section 92, No. 16.

VISCOUNT HALDANE: But section 92, No. 16, is a mere generality, and section 92, No. 13, is a very specific thing?

Mr. DUNCAN: Yes, but in substance the Act is not, if one takes the Provincial Act, an Act which you might classify under section 92, No. 13.

VISCOUNT HALDANE: I do not know.

Mr. DUNCAN: I suggest not.

VISCOUNT HALDANE: Why not?

Mr. DUNCAN: I suggest the object of the Act was not to alter “civil rights,” but it was to deal with a local and private disturbance.

VISCOUNT HALDANE: What difference does it make if in the carrying out of it the machinery interferes with “property and civil rights”?

Mr. DUNCAN: That is the very point that Lord Macnaghten makes in the liquor legislation in the last case.

LORD ATKINSON: Long ago all the legislation that was placed against heretics was not done for the purpose of killing them, but to prevent them spreading false doctrines and professing a false faith. The machinery may interfere with civil rights, although the object may be different.

VISCOUNT HALDANE: I think the object was to interfere with civil rights.

LORD ATKINSON: I think it was; they both existed.

Mr. DUNCAN: But, my Lord, is that the test, is interference with civil rights the test; it does not say so in the Act.

LORD ATKINSON: Why on earth should it say so?

VISCOUNT HALDANE: Do you mean the test of validity?

Mr. DUNCAN: Yes, or the test of classification.

VISCOUNT HALDANE: The Dominion of Canada have no power to interfere with No. 13 of section 92 unless that power is expressly enumerated in section 91, or is something implied.

Mr. DUNCAN: I am speaking for the moment of the test of classification. If one is to classify the Provincial Trades Disputes Act, under what enumeration in section 92 would one place it?

VISCOUNT HALDANE: Why should you classify it; it may come under different heads.

Mr. DUNCAN: In 1896 Appeal Cases they held that legislation cannot come under more than one head logically.

VISCOUNT HALDANE: Not under more than one?

Mr. DUNCAN: Not if the legislation has only one object.

VISCOUNT HALDANE: Where did they say that; I want to see that?

Mr. DUNCAN: At page 365 of 1896 Appeal Cases Lord Watson says: "It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them".

VISCOUNT HALDANE: Well, go on.

Mr. DUNCAN: In section 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in section 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated.

VISCOUNT HALDANE: That is explaining the interpretation; he does not for a moment say a thing is not local because it affects civil rights; it may come under both. All he says is in No. 13 civil rights is something different from No. 16, which is a sweeping up section carrying in all things that are not enumerated, just like the peace, order and good government sweeps up things in section 91.

LORD DUNEDIN: I confess I find it a little difficult. Nobody knew what Lord Watson meant better than Lord Macnaghten but it is difficult to reconcile those two sentences. The one on page 365 of 1896 Appeal Cases is where Lord Watson says "It"—that is No. 16—"assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated". Lord Macnaghten in 1902 Appeal Cases says: "A careful perusal of the judgment leads to the conclusion that in the opinion of the Board the case falls under No. 16 rather than under No. 13". I have read the other sentence as precisely the opposite.

VISCOUNT HALDANE: I should have thought so; I think Lord Watson was saying that No. 16 is not tautologous, it is sweeping in something not enumerated. I find Lord Macnaghten's sentences a little obscure.

LORD ATKINSON: If there was an Act passed which enabled some things like money to be recovered from a man by execution, if the execution was put in force, and it was properly situated in the province, and it was seized, and it was held afterwards all that procedure was unlawful, would not it affect his property, his civil rights, and fall within a local matter, the property being situate in the province?

LORD DUNEDIN: I wish Lord Macnaghten was here; I think Lord Macnaghten was getting at our old friend *Russell v The Queen*. He says: "Indeed, if the case is to be regarded as dealing with matters within the class of subjects



enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter". That is to say it might be questionable whether *Russell v The Queen* was rightly decided.

Sir JOHN SIMON: Do not you think, my Lord, that Lord Macnaghten had his eye on the passage at the very top of page 365 in 1896 Appeal Cases: "It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *prima facie* within No. 16". I do not know, but it seems to me to be so.

VISCOUNT HALDANE: If there is a particular village with a great deal of drunkenness it may be thought that it would be proper to deal with it under No. 16, but it would none the less be an interference with the civil rights of the people of the village to enjoy their liberty to get drunk.

LORD DUNEDIN: You do not make it easier for me, Sir John; look at the next sentence: "In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed." That is to say in other words *Russell v. The Queen* could not be supported if it was under No. 16, whereas Lord Macnaghten says it could not be supported if under No. 13, it could only be supported under No. 16. It is not altogether easy to reconcile.

VISCOUNT HALDANE: It might come under both, but No. 16 is only a sweeping up clause.

LORD DUNEDIN: I do not think really in the long run it much matters because you always come to this, if you begin with the hypothesis that it either comes under No. 13 or No. 16 you have always got to go back to this: "Well, there is such a state of affairs, so to speak, left out of it, and you put it in the general power of the Dominion under peace, order and good government.

Mr. DUNCAN: I am not labouring that point any further my Lord.

VISCOUNT HALDANE: Then we will adjourn.

(Adjourned until to-morrow morning).

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#### FOURTH DAY

COUNCIL CHAMBERS, WHITEHALL, S.W. 1,  
FRIDAY, November 21, 1924.

Mr. DUNCAN: My Lord, may I read your Lordship two of Mr. Lefroy's rather useful propositions? I think your Lordships have spoken in high terms of Mr. Lefroy's book.

VISCOUNT HALDANE: I think there are three books.

Mr. DUNCAN: Yes, this is his last.

VISCOUNT HALDANE: I am not sure that I did not like the first even better.

Mr. DUNCAN: He had a very fine mind. It is propositions 54 and 55; those are on the "aspect" doctrine which Lord Dunedin characterized as the *but* of the legislation. The only possible test, I submit, which can be applied to the British North America Act to make it workable (because, as was said in one case, the enumeration in sections 91 and 92 do not embody the exact disjunction of a perfectly logical scheme, but they overlap) is the aspect. I suggest

it is founded on the words of the Act; that is the only possible test: "Subjects which in one aspect and for one purpose fall within the jurisdiction of the Provincial Legislatures under section 92 of the British North America Act may in another aspect and for another purpose fall within the jurisdiction of the Dominion Parliament under section 92."

VISCOUNT HALDANE: It is not necessary to recite Lefroy for that; it was said in the earlier cases.

Mr. DUNCAN: Yes, my Lord, and I submit also in the later cases.

VISCOUNT HALDANE: It was said over and over again.

Mr. DUNCAN: It is the test.

VISCOUNT HALDANE: You will find that in the *Parsons* case.

Mr. DUNCAN: It is in the *Parsons* case, and it is in *Russell v. The Queen* and *Hodge v. The Queen* explained and approved *Russell v. The Queen* and put it on the aspect ground.

VISCOUNT HALDANE: It is copiously referred to in the *Parsons* case.

Mr. DUNCAN: Yes, and subsequently applied by this Board in the Railway cases.

LORD ATKINSON: What does the word "aspect" mean; is it the aspect of the framer of the Act, or the object and purpose to which it was evidently directed?

Mr. DUNCAN: The aspect, I submit, on what your Lordship says, is, is it the true aim and object of the Act?

LORD ATKINSON: That, I can understand.

Mr. DUNCAN: Is it truly aimed at altering the civil rights of persons, or is it truly aimed at preventing an industrial disturbance, the alteration of civil rights being incidental and necessarily ancillary to the true object of the Act? Now that test has been applied in all cases, my Lords, in the *Railway* case, the *Canadian Pacific Railway v. Bonsecours*, and the other railway cases. In the *Canadian Pacific Railway v. Bonsecours* this question came up: Could the provinces by legislation compel a Dominion railway to create a ditch on its line. Your Lordships held that it could not because that in its true aspect would be legislation *qua* railway, the alteration of the structure of the railway, but if the provinces said that all persons in the province must clean out ditches so that they shall not be choked with silt and rubbish, that in its true aspect was municipal legislation within the province, not municipal institutions but legislation falling under No. 16 of section 92. That was applied in subsequent cases in railway matters. A western province put in certain regulations saying that if the railways did not put in a certain type of flue to catch sparks they should be liable in damages for fires. That was held by the Supreme Court of Canada, following the *Canadian Pacific Railway v. Bonsecours*, to be legislation *qua* railway, that it was the construction of the engine which was intended to be dealt with, and not "property or civil rights." That has been applied in other cases, in the *Aliens* case and in *The Union Colliery v. Bryden*, and your Lordships held that Provincial legislation depriving Chinese and other aliens of the right to work underground in mines was not in its true aspect intended to be with reference to local works and undertakings although it dealt with local works and undertakings, mines in the province, but was legislation on aliens which was a Dominion subject, and therefore it was held to be *ultra vires*. Then in another case that was discussed before this Board, in the *Tomey Homa* case it was said that no Chinese or Japanese could have a Provincial franchise. The question was: Was it in its true aspect legislation on aliens, and your Lordships held that it had to do with the Constitution, the voting of aliens in its true aspect. Now that is the test in every case, and I suggest to your Lordships the only possible test, and it must be applied impartially.



LORD ATKINSON: In other words, it is the purpose and object of the Act, was it to deal with provincial matters, and not Dominion matters?

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: In the *Tomey Homa* case where the question was whether Chinamen should be deprived of the vote, they said in its aspect it deals with aliens, but the primary and dominant aspect is dealing with the provincial franchise.

Mr. DUNCAN: Yes. I ask what is the true aspect in this case, is it an attempt to regulate the civil rights of employers in the province? Is that the paramount matter dealt with? Is it not rather the disturbance of trade, the possibility of riot, and the necessity for the use of the militia, and all those other consequences which follow from industrial disturbances, not in every case.

VISCOUNT HALDANE: Now, Mr. Duncan, is not the difficulty in your argument there that undoubtedly this does interfere with civil rights, and therefore you must find some justification for it; you cannot find it under "trade and commerce" because, according to the decisions of the board, that is not specific enough to cover these things; you cannot find it under criminal law, you cannot find it under the general power at the beginning of section 91, and unless you can show that *Russell v. The Queen* has decided conclusively that there is a principle of universality which interferes there, do not you come back to the extent of the decision in *Russell v. The Queen*? Undoubtedly it is a binding decision to this extent, that the Canadian Temperance Act was within the power of the Dominion. Whether you can draw any inference from that decision as to any underlying principle is a question you can only answer if you look at the long series of authorities that have been decided since.

Mr. DUNCAN: May I, with great respect, point out what I think is the real answer to that question? Your Lordship said this Act does interfere with property and civil rights. Now I suggest to your Lordships that that is not the test — interference; that is vital here.

VISCOUNT HALDANE: What is my civil right if it is not to lock out?

Mr. DUNCAN: I grant it is a civil right; this is an interference with civil rights unquestionably, there is interference with the conduct of a local work or undertaking.

LORD ATKINSON: I think you mean it is not the primary purpose, it is part of the machinery which they must resort to, to effect it; is that it?

Mr. DUNCAN: That is part of the answer. I am dealing for the moment with this test, is interference the test, and I concede that it interferes, this legislation, not in its substantive provisions, but in its ancillary provisions with property and civil rights. In a moment I am going to say the ancillary provisions take their colour from the substantive provisions. I am dealing only with the test of interference.

VISCOUNT HALDANE: Interference, that is not the test. If you can get back to a substantive power of the Parliament of Canada, then you have got something that can interfere, but you have got to get that something first before interference can be put out of the way.

Mr. DUNCAN: With all respect, is not the test first: Does it fall within section 92?

LORD WRENBURY: What is the antithesis to civil rights? I suppose "civil rights" means my rights as a citizen.

VISCOUNT HALDANE: Criminal rights, I should think it would be.

LORD WRENBURY: You could have it that the right of the criminal to be tried by the particular tribunal is his right as a citizen; when you get to "criminal", certainly that is outside. I cannot myself find a true antithesis to civil rights. What is the other adjective?

Mr. DUNCAN: Not a very precise phrase, but one which was used in *Russell v. The Queen* is, that the antithesis was between "civil rights" and "public wrongs".

LORD WRENBURY: A right not to suffer a wrong; you are speaking of rights not wrongs.

LORD ATKINSON: I should say a civil right is a right which the civil law, as distinguished from the criminal law, entitles you to exercise.

VISCOUNT HALDANE: Yes, you are recognised as a citizen.

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: You can answer that if you turn to the criminal law of England which is the common law there, that everybody is at liberty to do what he pleases; liberty is the basic principle of the Constitution; you find that fully laid down and explained by Mr. Dicey in his book on the Constitution. If it is interfered with, it must be interfered with by the political parliament as far as the prerogative arises.

Mr. DUNCAN: May I say in answer to that question, when one looks at the genesis of the Act the desire was to give to the provincial legislatures exclusive power to pass laws dealing with civil rights, whatever that is. The original conception was to preserve to Quebec its civil laws in all those matters which were dear to the inhabitants of Quebec, and that English law should not be brought in.

LORD WRENBURY: You confine it to rights under the civil law?

Mr. DUNCAN: No, I do not think it can be confined to rights under the civil law. The *Citizens Insurance Co. v. Parsons* goes further. Although the Provincial Legislature is given the sole power of giving rights to persons the Dominion is not thereby deprived of the right of imposing duties on Dominion subjects under peace, order and good government. I oppose public duties to civil rights.

VISCOUNT HALDANE: I think you are putting a very wide proposition, that under peace, order and good government, you can restrict the liberty of the subject of the province.

Mr. DUNCAN: Under the United States Constitution they can apply the police power, although there is no residuum; we have a residuum.

VISCOUNT HALDANE: I have been looking closely into that; both the States and the Dominion have police power, but merely as ancillary, and as a way of working out the power that they have already got.

Mr. DUNCAN: That is my answer for the moment, if I may say so.

Now may I return to the question which we were discussing, the question whether you can say that legislation *prima facie* falls within section 92 because it interferes with an enumerated subject? Now it cannot be put better, I submit to your Lordships, than in the very precise words of *Russell v. The Queen* at page 838: "It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under sub-section 9, is not in itself legislation upon or within the subject of that sub-section, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion."

VISCOUNT HALDANE: No wonder Lord Watson expressed a note of thankfulness that he was relieved from the difficult task of deciding whether that was right.

Mr. DUNCAN: But, my Lord, is that the test?

LORD ATKINSON: Take an example; take an Act requiring publicans to close their doors at a certain time. That would interfere with their rights because by their license they would be able to sell up to the closing hours, and if you shorten it that would be interfering. If you pass a law preventing a man from driving



or walking along a public road except under certain conditions you interfere with his civil rights because, according to the common law, he has a right to walk along a public highway; there is no mistake about it.

MR. DUNCAN: I accept that entirely. May I give your Lordship what I conceive to be the answer to that, that that is the first of two steps; one says to begin with: Does it interfere with any civil right, and, secondly, if so, is it the true aspect of the legislation; is it in relation to that civil right, or is it legislation in relation either to an enumerated head of section 91, or under peace, order and good government?

LORD ATKINSON: I understand that perfectly well; interference was not its primary purpose, but its subordinate purpose; its primary purpose was a different thing.

VISCOUNT HALDANE: How can you assert that "peace, order and good government" gives authoritative sanction to interfere with civil rights under section 92? The words of section 91 say expressly it is not to be so.

MR. DUNCAN: May I, with all respect, refer to the words of the Act, the two sections 91 and 92. Under section 91 the Dominion is given power to legislate for "the peace, order and good government of Canada *in relation to* all matters coming within the enumeration in section 92?"

VISCOUNT HALDANE: Yes.

MR. DUNCAN: "In relation to"; the phrase is not, so as to interfere with, but "in relation to all matters."

VISCOUNT HALDANE: All matters not coming within a class of subject.

MR. DUNCAN: They suggest "aspect" as a test, is it truly in relation to "property and civil rights", is that its main purpose?

VISCOUNT HALDANE: If it is the main purpose you have no power to do it.

MR. DUNCAN: If it is in relation to "property and civil rights."

VISCOUNT HALDANE: Yes. If you get that in relation to something that is not within section 92 then you can do it, but if it is within section 92 by the express words of the Statute you are not to do it, it is *ultra vires*.

MR. DUNCAN: My point is that the Legislature in passing this Act did not say the Dominion may not legislate so as to interfere with any of the matters set out in section 92.

VISCOUNT HALDANE: I thought it did.

LORD ATKINSON: Surely that which interferes with the particular right must have relation to the right.

MR. DUNCAN: That is not the aspect, the true pith and substance of the Act.

VISCOUNT HALDANE: You may make laws and regulations with regard to anything not coming within section 92, but this comes within section 92.

MR. DUNCAN: You must read the words exclusively to make laws in relation to civil rights.

LORD WRENBURY: If there is something that requires peace, order and good government which is not in relation to a thing for which power is given to the province where is the power given?

MR. DUNCAN: It is in the Dominion. This Board has said that the whole legislative power is divided between the provinces and the Dominion, that is to say, they have taken the absolute plenary power from the Imperial Parliament with the possible exception of laws giving extra territorial jurisdiction; you have within Canada the absolute plenary powers divided between the provinces and the Dominion.

VISCOUNT HALDANE: Assume that to be so for the sake of argument.

Mr. DUNCAN: It has been decided here.

VISCOUNT HALDANE: It has not been decided here; there were certain points with regard to education where we could not find any power. It is a small matter section 93. Do not dwell on it. It is only the outcome of this, that a bifurcation was made of all subjects which the Imperial legislation handed over to Canada, they handed over all that Canada asked for. It is, however, true that Canada did not ask for a scientific division, they said peace, order and good government except with regard to what the Legislatures of the provinces generally do. What is not under section 92 we include to-day in the numerous heads of section 91, that is all.

Mr. DUNCAN: May I give your Lordship in a moment a reference to the case that I am relying upon, and which says, as I understand it, that it is decided by this Board that the whole legislative power is divided between the two.

VISCOUNT HALDANE: That is a popular expression, and even judges in the Judicial Committee are human; you must not strain casual expressions in connections where they are not applied. It is not true.

Mr. DUNCAN: Now my Lord on "aspect" Mr. Clement says the same thing in his book, the third edition in 1916, at page 484: "The one great cause of difficulty in all these cases is the fact that subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91, and therefore at the threshold of every case this test question of aspect and purpose confronts one. Various phrases have been used by the Privy Council to frame the issue in a clear and practical shape. Collecting these, the test to be applied may be thus stated: In order to ascertain the class to which a particular enactment really belongs, the primary matter dealt with by it, its subject-matter and legislative character, the true nature and character of the legislation, its leading features, its pith and substance must be determined". Then at page 488: "The cases as to the liquor traffic also merit special notice. What is popularly known as the *Scott Act* or more accurately the Canada Temperance Act providing for prohibition throughout Canada on a local option basis was upheld in *Russell's* case, as dealing with the traffic in its large Canadian aspect as affecting the body politic of the Dominion; while provincial regulations and even prohibition of the traffic in its provincial aspect has been upheld by the Privy Council. On the other hand, the Dominion Liquor License Act, commonly known at the time as the McCarthy Act, was held to be a dealing with the traffic in what was really its provincial aspect, and was for that reason presumably held to be *ultra vires*". Then Mr. Justice Clement treats of "colourable legislation" and gives a quotation from Mr. Justice Duff in the *Companies case*: "If a province professing to legislate in exercise of the powers conferred by section 92 shows by its legislation that it is in reality attempting to exercise some power conferred upon the Dominion, exclusively, then the legislation may be *ultra vires*". Then: "But it has never been held, and manifestly it would be impossible to hold, that the court has any power to effect the nullification of a provincial statute because of the motives with which the legislation was enacted".

VISCOUNT HALDANE: All these things are truisms; it is their application that counts. You have an admirable application of the aspect in the Montreal case in 12 Appeal Cases, that a railway in a provincial territory could not be interfered with because of the Dominion express power giving exclusive jurisdiction over the inter-provincial railways to the Dominion. That is a case where the subject did not come within property and civil rights which were handed over to the province. Take banking, that is a Dominion subject, but it also obviously interferes with civil rights: it is expressly provided where 91 conflicts with 92, 91 is to prevail.



MR. DUNCAN: I think, if I may say so, it is quite clear that aspect is the test universally applied, and I suggest to your Lordships it must be applied in testing provincial legislation under section 92 as to whether in its true aspect it is legislating about section 91 or not; also in testing Dominion legislation under the enumerations of section 91, and in testing Dominion legislation under the peace, order and good government clause; and it is to be applied, I suggest, impartially.

Now may I mention to your Lordships a phrase which is to be found in 1916 1. Appeal Cases, the Insurance case, in which, for the first time, it appears to be suggested that that doctrine is not to be applied always. At the middle of page 596 your Lordships see: "The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied, only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction". In the Board of Commerce case, the only other criticism that I have been able to find of the aspect doctrine is at page 200, at the bottom of the page. Your Lordships see: "Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell v. The Queen*, both here and in the courts in Canada, has always been applied with reluctance". Now those are the only two references to the reluctant application of the doctrine that I have been able to find. My learned friend Mr. Geoffrey Lawrence says that in 1896 Appeal Cases Lord Watson says it must also be applied with caution.

LORD ATKINSON: I think I can give an illustration. Supposing there was a plague in the country and an Act was passed that no person should frequent a theatre or a tramway or a train till ten days or a fortnight after he had recovered from the plague; he has certainly a civil right to travel. Of course the primary purpose of that legislation is not to prevent him travelling, the primary purpose is to prevent the spread of infection, but incidentally the way you do that is by not allowing a person who has the disease to go into the company of others till a certain time has elapsed.

VISCOUNT HALDANE: If you have the power in the Dominion you can do that.

MR. DUNCAN: Does not that apply precisely in this case? The primary purpose is to prevent industrial disputes.

VISCOUNT HALDANE: That is another matter; Lord Atkinson said a plague.

MR. DUNCAN: This is a dispute that affects the body politic.

VISCOUNT HALDANE: Plague is a thing that affects the whole community.

MR. DUNCAN: And so, my Lord, do industrial disputes.

VISCOUNT HALDANE: I think the British North America Act would have been very differently framed if that had been imagined to be the effect of it.

MR. DUNCAN: At the time the British North America Act was framed in 1867 there was no conception of industrial disputes in the sense in which they are understood to-day; Canada was a farming community and master and servant law was of a very stringent character, it was quasi slavery legislation. There were in 1891 only on the average  $4\frac{1}{2}$  employees to an industrial establishment. Just as in the American Union they did not, in 1773, when they formed their Constitution, know anything about railroads, still the railroads have come under the general jurisdiction by legislation and decisions in accord with the spirit of the Constitution, so I suggest here do matters not enumerated, (as your Lordship said in one case, that an unenumerated subject matter falls under the head of peace, order and good government) so do matters not enumerated, such as industrial disturbances and strikes which are very real matters,

quite as real as the plague, and more disastrous than the plague, because they can strike at the foundation of the State. Your Lordship will remember the case of *The King v. Russell* on the Manitoba strike which was brought to this board on an application for leave to appeal. That is reported in 51 Dominion Law Reports, and it is in the year 1920. That came up under Dominion legislation dealing with criminal law, dealing with strikes and so on. The Court of Appeal of Manitoba held—this is the Winnipeg strike, which was directed not only against the economic, but also the political life of Canada—"Under section 590 of the Criminal Code it is lawful for workmen to combine in a strike in order to get higher wages, and persons who aided or encouraged such a strike would not be committing an unlawful act, because they were endeavouring to bring about something that was legal; but this section can be no protection where the conspirators did acts and caused acts to be done which were offences punishable by statute, and therefore not protected by section 590, and where the ultimate purpose of the strike as declared in public speeches and propaganda was revolution, the overthrow of the existing form of government in Canada and the introduction of a form of socialistic or Soviet rule in its place, which was to be accomplished by general strikes, force and terror, and if necessary bloodshed. The conspirators of such a strike are guilty of seditious conspiracy under section 134 of the Criminal Code." Your Lordships will find in the judgments of Chief Justice Perdue, Mr. Justice Cameron and Mr. Justice Dennistoun details of the matter. At page 24 they speak of the meetings of these people prior to the strike which, as Mr. Murdock says, broke out in quite an ordinary way in three small industrial establishments in Winnipeg which were not under the Industrial Disputes Act and at once spread to other provinces of Canada; there were strikes at Brandon, at Edmonton and other places, sympathetic strikes, and his own men from the best disciplined labour organization in the United States and Canada, the Brotherhood of Railroad Trainmen, law abiding as he considered them, adhering to their contracts, went out and struck in sympathy because of class feeling, and the belief that class interests were in jeopardy, and Mr. Murdock, who was at the time the Vice-president of the Canadian branch of the International Brotherhood, which has about 175,000 labour men in it, 14,000 or 15,000 of whom were in Canada, went to Winnipeg to break the strike of his own unlawful strikers, and he did his very best. He said he would not have believed it possible that men previously law-abiding would be carried away by this propaganda in this way; there was a riot. The strike committee allowed the bread to be distributed only under the permit of the strike committee; they seduced the police, and special police had to be put in; the moving picture theatres were allowed to be run only with a notice up at the beginning of each film which said: "Permitted by authority of the Strike Committee," and it was most serious. If your Lordships have any doubt about it I would ask your Lordships to look at the findings in *The King v. Russell*.

VISCOUNT HALDANE: That brings it into the conception of negotiation. Strikes were illegal by the Common Law of England. The strike legislation of England never authorized strikes of that kind, they remained a crime.

MR. DUNCAN: Yes.

VISCOUNT HALDANE: And it was a crime in the statute book, and no English statute such as was incorporated within the Act would permit such a crime to be permitted, indeed no English Act. They were treated as an illegality altogether, not a civil right.

MR. DUNCAN: I was replying to Lord Atkinson's suggestion that strikes are not serious, like plagues.

VISCOUNT HALDANE: Some strikes are.

LORD ATKINSON: I did not say that; of course a strike may be very serious.

VISCOUNT HALDANE: And very grossly illegal.



LORD ATKINSON: This is directed to discourage violence and crime.

Mr. DUNCAN: It is not only in Winnipeg in 1919, but this propaganda is going on throughout Canada.

VISCOUNT HALDANE: Assume that to be so.

Mr. DUNCAN: May I refer to another case. There is the case in the very last number of the Ontario Law Reports, where Mr. Justice Kelly in Ontario, in trying the case which had to do with the Ukrainian Society—

VISCOUNT HALDANE: What has that to do with this; if we were dealing with legislation under the Act as to criminal law, it would be very relevant, but you are not suggesting that?

Mr. DUNCAN: I suggest this, that if strikes in the present condition of labour organization throughout Canada could start and be very quickly turned into an attack on the State, the Parliament of Canada must have power and jurisdiction over that subject, because one cannot say in advance what strike will turn into this sort of paralysis at any moment.

VISCOUNT HALDANE: If your first proposition is true, there is a great deal in it. It is a proposition we are more familiar with on the political platforms than in the Law Courts.

Mr. DUNCAN: I would suggest in the interpretation of the British North America Act, if there is room for doubt, that your Lordships are entirely clear to decide in this case, because there are only dicta to the contrary, that the jurisdiction in present conditions must be given to the Dominion; no harm can possibly come to the provinces, because under the decisions there is the co-ordinate jurisdiction in the province to deal with strikes as matters of local concern, provided only that provincial legislation is not repugnant to the general Dominion legislation.

VISCOUNT HALDANE: We are unfortunately sitting here construing an Act of Parliament. If in Canada you wish it to be amended, I have not the least doubt, as far as getting over the technicalities are concerned, that the Imperial Parliament here will amend it for you at once. You can say that from Canada, but it has not yet been said from Canada.

LORD DUNEDIN: I gather what you want to say is this, that industrial unrest is just as all-pervading an evil as intemperance was said to be?

Mr. DUNCAN: Much more so.

LORD DUNEDIN: It cannot be more than all-pervading.

VISCOUNT HALDANE: Do you put that forward as Canadian opinion?

Mr. DUNCAN: There are plenty of people in Canada who like their glass of beer. I say industrial unrest is more all-pervading, if one can put it that way, than the plague because it is with us all the time; we are constantly having sympathetic strikes and the other effects that follow their operation.

LORD DUNEDIN: I do not see why you say it is more all-pervading than intemperance, but you can say it is more hurtful.

VISCOUNT HALDANE: The late Mr. MacLaren in Canada would have denounced that very much.

Mr. DUNCAN: May I refer to the criticism which my friend Mr. Geoffrey Lawrence made about my statement, that there are only two cases which suggest that the aspect doctrine is not to be applied. My friend referred to the beginning of page 361, of 1896 Appeal Cases, in which your Lordships say: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and there-

fore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada". I submit that, looked at critically, does not affect the aspect doctrine at all.

VISCOUNT HALDANE: I am not suggesting that it does.

Mr. DUNCAN: The whole of the four liquor cases, *Russell v. The Queen*, *Hodge v. The Queen*, the *Attorney-General of Ontario v. Attorney-General for Canada* and the *Manitoba License Holders' Association* case proceed on the aspect doctrine, and I suggest that it is not attacked anywhere until 1916 Appeal Cases. Then as to the question of co-operation, may I refer to *Dobie v. The Temporalities Board*, in 1882, 7 Appeal Cases, at page 136.

VISCOUNT HALDANE: That is a case we know very well.

Mr. DUNCAN: Yes, my Lord, I will not read it.

VISCOUNT HALDANE: It is very far away from anything we have got here.

Mr. DUNCAN: It seemed to me, my Lord, to be relevant in this way.

VISCOUNT HALDANE: It prevented the Legislature of Quebec from taking away rights which other people had got previous to Confederation.

Mr. DUNCAN: Did not it say that where you have an Act which affects two provinces, although it affects civil rights, the only power which can pass it is the Dominion Legislature? Now here I say that is not co-operation, that is the antithesis of co-operation.

VISCOUNT HALDANE: I do not know that it did decide definitely that the Dominion could legislate; that was not before the board; the question was whether Quebec could legislate.

Mr. DUNCAN: Yes, and they said it must be by the Dominion.

LORD ATKINSON: I do not think it follows at all, that if one province can legislate for itself and another, that therefore the Dominion can legislate for the two combined.

Mr. DUNCAN: I only mean it is truly for Canada as distinguished from the provinces.

VISCOUNT HALDANE: Even then it does not follow, because the Imperial legislation may not give the Dominion power.

Mr. DUNCAN: That doctrine of co-operation first appeared in 1912 Appeal Cases in the *Montreal Street Railway Case*. I suggest there is no suggestion of it in any previous cases. I suggest to the contrary, that *Dobie v. The Temporalities Board* is quite the other way. You do not look for co-operation where you need legislation in more than one province or for the whole Dominion and it can only be passed under the British North America Act.

VISCOUNT HALDANE: That is a doctrine I hear for the first time.

Mr. DUNCAN: I advance it quite seriously, my Lord. I say that co-operation first appeared in 1912 Appeal Cases.

VISCOUNT HALDANE: I do not think that co-operation appeared in 1912 Appeal Cases; all that was said was that the Dominion must have the authority to deal with an interprovincial railway.

Mr. DUNCAN: It is the first time I have been able to trace any mention of co-operation. There are only three references to co-operation. The next is in the *Board of Commerce* case, reading the sentence on page 201 and running on to the top of page 202: "In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to



has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures."

VISCOUNT HALDANE: I am glad I have escaped as lightly as Lord Atkinson. After what you read I plead not guilty to the enormity charged.

Mr. DUNCAN: Your Lordship appreciates the difficulty I am in. I am here to put a certain case to your Lordships, and I must discuss the cases.

VISCOUNT HALDANE: And you do it excellently. You are putting the whole case before us from the point of view of the Ministry of Labour as powerfully as it could be put.

Mr. DUNCAN: From the point of view of the Dominion Government.

VISCOUNT HALDANE: The Ministry of Labour is a Dominion Ministry.

Mr. DUNCAN: I may say, if my learned friend will permit me to say something out of the Record, that I brought a message over here to Counsel from the Prime Minister himself in connection with this matter; it is his own child.

VISCOUNT HALDANE: We will treat it with more reverence than we did.

Mr. DUNCAN: I mention it only on that point, that your Lordship said it is the Ministry of Labour only that is interested in this; it is not.

VISCOUNT HALDANE: I did not suggest that; I said you had a very powerful plea on behalf of the Ministry of Labour. You have no message from the Prime Ministers of the provinces?

Mr. DUNCAN: The Provincial Legislation on this subject is a dead letter.

VISCOUNT HALDANE: I wonder what they would say about that?

Mr. DUNCAN: British Columbia had a statute and they repealed it last year by the Obsolete Statutes Repeal Act.

VISCOUNT HALDANE: I should like to know why; they probably had some political reason that seemed to them good. Do not go into it. You cannot go into it. It involves discussions in the British Columbia Legislature.

Mr. DUNCAN: On page 41 of the Record there is a letter from Mr. Rollo, the Provincial Minister of Labour, to Mr. Gunn, who was acting for the men at that time, dated April 18, 1923, in which he says: "Dear Mr. Gunn, I have your letter of the 9th inst. re a dispute between the Toronto Electrical Commissioners and the Canadian Electrical Trades Union, and asking that a registrar be appointed under the Trades Disputes Act. Although this Act has been in existence for a number of years"—since 1890 as a matter of fact—"we have never before had occasion to use it, and consequently have no machinery immediately available. The matter is, however, receiving careful consideration, although I am still not convinced that it is not a matter which should be dealt with under the Dominion Industrial Disputes Act." That was all that happened, nothing further was done. Now contrast that evidence with the evidence of Mr. Acland, which is to be found at page 106 at the bottom of the page, what he says is: "Altogether during the period I have indicated, from March 22, 1907, down to March 31, 1923"—1907 was when the Act was passed—"there were 597 cases referred under the terms of the Act, and 428 Boards of Conciliation were established."

VISCOUNT HALDANE: This is the Lemieux Act?

Mr. DUNCAN: Yes. At the top of the next page he goes on: "In 428 cases Boards were established. Out of 597 disputes referred under the Act, in each of which cases there were sworn statements to the effect that a strike or lockout (although a lockout practically never occurred) would occur to the best of the knowledge and belief of the applicants, all were disposed of without strikes and lockouts with the exception of 37 cases."

LORD ATKINSON: Were these cases dealt with under the Act that you are defending?

Mr. DUNCAN: Under this Act in practical operation. The British North America Act may have unfortunately put jurisdiction in a wrong place, but as a practical proposition in Canada, all these disputes came under the Lemieux Act, the only Act competent to look at Canada as a whole.

VISCOUNT HALDANE: I am not the least questioning that the Lemieux Act may be a great success, it has already been said so here; we cannot concern ourselves to enquire into these matters. The Lemieux Act was taken up here and was said to have been very successful.

Mr. DUNCAN: On the evidence of some of the witnesses which was given, it was at first opposed by Labour, but it has been since supported. As my friend said, it is a sedative measure, and Labour, which is liable to fly off, looks at the Act and believes in its justice. It is the only Act that could possibly deal with the subject satisfactorily from a Labour point of view, because if you have a provincial Act in each province differing, as many of them will in terms, because some provinces will say: "We are not going to treat Labour generously, we are going to say we will not have machinery for your Act," we shall not have a recognition in the case of some of the provinces; and you may have a dispute breaking out in Ontario, and you may go under a Provincial Act, and then you may find that that spreads to Quebec, and possibly to some other industry.

VISCOUNT HALDANE: I think in Parliament last year it was said that it has not been the practice under the Lemieux Act, or it has not been necessary, to impose fines, it is a way to avoid a strike.

LORD ATKINSON: There have been strikes in face of the provisions of the Lemieux Act.

VISCOUNT HALDANE: They have not put the criminal law in force.

Mr. DUNCAN: People have been convicted and sent to gaol.

VISCOUNT HALDANE: This has been said in favour of the Act, that it has been so much accepted that there has been very little necessity for that.

Mr. DUNCAN: Comparatively little. Possibly the closest criticism of the Act up to that time was that made by Sir George Askwith, who made a special study of the matter when he was in Canada. The Act has been uniformly successful, one may say, leaving out a few exceptions, and has the support of Labour; it has Labour's sympathy, and Labour recognizes the justice of the provisions. It is a great piece of political work in reaching that point, and if, unfortunately, the framers of the British North America Act were not so wise as they believed, and the legislation properly falls under the other head of these decisions, it is a question of *quieta non movere*.

VISCOUNT HALDANE: You are speaking as a politician.

Mr. DUNCAN: No, my Lord, I am not.

VISCOUNT HALDANE: There is a great deal in what you say as a lawyer. My point is that you are speaking as a lawyer to a lawyer. I cannot look at these things.

Mr. DUNCAN: The only other case in which co-operation was mentioned was in 1923 Appeal Cases, the *Fort Frances case*, at page 704, in which your Lordships say this: "The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual provinces agreeing for the purpose".

VISCOUNT HALDANE: That was in time of war and we were speaking of a war measure.



Mr. DUNCAN: Yes. Your Lordships said this is not a case where we can depend on collective action of the Legislatures even in war.

VISCOUNT HALDANE: Particularly in war.

Mr. DUNCAN: The suggestion I draw from the case is that in war you may have decisions of, not this board, but of a subsequent board, saying: But while we think this is a case in which you should have collective action of the Legislatures such a decision may vary with the composition of the board, because there are no legal principles on which the board can say this is an emergency, or that is an emergency. If it is an emergency what is the legal principle? Does emergency depend on evidence or are the parties to bring evidence here of conditions in Canada. Emergency is not a legal conception under the British North America Act, and I submit to your Lordships that the true test is, is it in relation to, or is its aspect peace, order and good government. As to what is its paramount purpose your Lordships are the sole judges of that. If your Lordships say no, that settles the question, but to say that in cases of emergency we will write into the Constitution an over-riding clause saying: now the Dominion may legislate because we are satisfied, on the evidence given to us, that there is an emergency of greater or less degree, I submit is a most dangerous kind of doctrine, because under a Constitution such as this one must have certainty in advance that what one is dealing with is within the power.

LORD ATKINSON: I will put this question to you. If you have an Act of the Dominion very drastic in character whose paramount and primary purpose was dealing with a plague, suppose there was no plague and the validity of that Act were brought up here, are we to take it for granted that there was a plague when there is abundant evidence to show that there is no plague?

Mr. DUNCAN: No.

LORD ATKINSON: That is an extreme case. I thought your argument yesterday was that if you find a Dominion Act dealing with any particular state of circumstances you have to assume that that state exists because the Legislature have said they are the best judges whether it does or not.

Mr. DUNCAN: No, that is not my argument at all.

VISCOUNT HALDANE: Surely if it purports to provide for or to deal with a certain thing which in fact does not exist it can be questioned.

Mr. DUNCAN: Yes.

LORD SALVESEN: I think you suggested there was a presumption?

Mr. DUNCAN: Yes.

LORD SALVESEN: I do not think you went so far as to say it was an irrebuttable presumption.

Mr. DUNCAN: No, I say there is a presumption, that the cases have laid down that the presumption is to be made in favour of the validity of the Act, and it is only when the onus is discharged that you can say, but this is not for peace, order and good government.

LORD ATKINSON: Does it apply to a Dominion statute that interferes with the rights of the local Provincial Constitution?

Mr. DUNCAN: That would be, if it is in relation to that, it would not be within Dominion competence. What is its true legislative character? Is it dealing with a Provincial Constitution, if so then it is outside Dominion jurisdiction under this Act.

LORD ATKINSON: Supposing it is an Act of the Dominion that plainly interferes with civil rights sacred to the inhabitants of Toronto, is that assumed to be all right, is there any *prima facie* presumption that it is all right?

Mr. DUNCAN: I submit that interference is not the test; it is the aspect; it is not the incidence.

LORD ATKINSON: Supposing the Constitution of Toronto had given its inhabitants certain rights, and supposing that the Dominion takes away those rights by a Statute from Toronto, are we to assume that that Statute of the Dominion is *prima facie* justifiable?

MR. DUNCAN: You would assume it until you saw its true aspect, and then you would see from its true aspect it is not that.

LORD ATKINSON: If you saw that its purpose was to take away certain rights from the inhabitants of Toronto that were given to it by the Local Legislature, are we to assume in the absence of all evidence that the Dominion have materials before them which would justify that legislation?

MR. DUNCAN: No, my Lord. You can conclude from the terms of the enactment itself that its true purpose is to deal with a Provincial matter and it does not require evidence.

LORD ATKINSON: The letter of the Act tells you that, but suppose they said the inhabitants of such Provinces shall only have certain rights which were narrowed from what they would be under the original Constitution, are you to assume that the state of facts existed which justifies that Dominion legislation?

MR. DUNCAN: No, I do not think you are to assume it any longer than up to the point that you can see that it is not.

VISCOUNT HALDANE: You are going to give us something about the evidence.

MR. DUNCAN: Yes, my Lord.

VISCOUNT HALDANE: I think we have got to a point now where we may have that.

LORD WRENBURY: Have you finished all you want to say about the law.

MR. DUNCAN: No, my Lord, I have not.

VISCOUNT HALDANE: I did not intend to stop you.

MR. DUNCAN: May I then turn to another branch of the matter, and that is, I want to refer to the conception of the British North America Act which I think is the true conception, that in 92 one has matters of local concern and in 91 of national concern.

VISCOUNT HALDANE: We have told you that we will hear Sir John Simon, notwithstanding that Mr. Clauson may have to speak to-day in his absence. We certainly will hear Sir John Simon so you are not cutting him out.

MR. DUNCAN: I understood that or I would not have thought of going on. I understood from what your Lordship was kind enough to say at the commencement that that was the case.

VISCOUNT HALDANE: We are particularly anxious to hear from you, without breaking into what you have to say on the law, something about the evidence, because you fought the case.

MR. DUNCAN: I have been much longer than I expected to be.

LORD WRENBURY: I should like to hear you out on the law.

VISCOUNT HALDANE: Do not for a moment think I am wishing to interrupt you, I am only reminding you.

MR. DUNCAN: Your Lordship has a reference in that case to the Quebec Resolutions. May I refer your Lordship to those Quebec Resolutions agreed to?

VISCOUNT HALDANE: That cannot affect the construction of the words of the Act of Parliament. They are read, Mr. Duncan, by an irregularity which has been sanctioned by usage, just as I think the Resolutions in Australia have been read, where they cannot modify the construction. If we were dealing with a diplomatic document it would be otherwise. When it is a Treaty all kind of things are read as material to qualify the particular construction, but it is not so with an Act of Parliament of the Empire.



Mr. DUNCAN: I quite realize the criticism there. May I as a matter of indulgence, because your Lordship has referred to this, read them, the ones I intend to rely upon.

VISCOUNT HALDANE: Do not apologize; I will not interrupt you again.

Mr. DUNCAN: May I refer your Lordship to what is well known by the board, that the British North America Act was agreed to and drafted at the time the American Civil War was raging, and the principal conception of the founders was to give to the Dominion Parliament unquestioned jurisdiction over matters of national concern and at the same time to preserve inviolate these matters of pure provincial concern which were dear, particularly to the people in the province of Quebec.

VISCOUNT HALDANE: You say preserve entire, but you must remember the provinces of Canada were independent colonies at that time.

Mr. DUNCAN: Yes, and what they did—I am coming to that—was this, they did not do as in Australia, (Australia reverted to the United States model, and South Africa comes again to a very close legislative union, it is a true legislative union) but Canada did this, it said: We will form all the provinces into one state which is the new state; they disappear as provinces; and then we can carve little provincial jurisdictions out of that state.

VISCOUNT HALDANE: I do not think they ever became one state, but they did receive their legislative power from the Imperial Parliament on a bargain that the Imperial Parliament would re-create these powers fashioned forth in a manner agreed at Quebec.

Mr. DUNCAN: Yes. Really we come back to the Quebec Resolutions for their intention. I do not speak of what their language now is said to have done, but their intention, and as a historical fact it is unquestioned that their intention was to make a legislative union with respect to matters of national concern and leave it to the provinces in matters of provincial concern.

VISCOUNT HALDANE: I wish you to be carefully guided by my own unfortunate example in the case about the Australian states, for the reasons you are putting. The Constitution of Canada is not a true federal constitution; it is not a case in which the original provinces remained independent states and took certain powers which should be exercised by the Commonwealth. For that sentence in that judgment I was criticised in a series of articles that extended over two years, and I need not say that the criticism came from Toronto.

Mr. DUNCAN: I do not know why I should be responsible for all the sins of prohibition and others of Toronto.

VISCOUNT HALDANE: I think you are on very delicate ground with regard to what you are saying now.

Mr. DUNCAN: I want to refer to the latest book on the Constitution of Canada, Mr. Kennedy's book which was published in 1922.

VISCOUNT HALDANE: I have read it. I think you will find some reference to the Commonwealth judgment which I was warning you about, standing where you are, as to the responsibility with which you utter words.

Mr. DUNCAN: Unfortunately, Mr. Kennedy is an Irishman, and I do not take all he says. He says at page 303: "Firstly, he (Macdonald), that is Mr. Macdonald who was afterwards Sir John Macdonald, never for a moment abandoned his consistent support of a strong central government", he is speaking of the Quebec momentous discussions before the Quebec Resolutions.

VISCOUNT HALDANE: The real contest was between Sir John Macdonald and Lord Watson.

Mr. DUNCAN: Ably assisted by other noble Lords: "When one of the delegates from New Brunswick pointed out that the proposal to specify the powers

of the local legislature tended to create a legislative union, Macdonald accepted the challenge and insisted that any imitation of the United States in this connection would end in disaster. Macdonald's wishes prevailed". Turning to the Quebec Resolutions may I refer to No. 2. That will be found in Mr. Clement's book on the Constitution at page 965: "In the Federation of the British North American Provinces the system best adapted under existing circumstances to protect the diversified interests in the several provinces and secure efficiency, harmony and permanency in the working of the union would be a general government charged with matters of common interest to the whole country; and local governments for each of the Canadas, and for the provinces of Nova Scotia, New Brunswick and Prince Edward Island charged with the control of the local matters in their respective sections; provision being made for the admission into the union on equitable terms of Newfoundland, the Northwest Territory, British Columbia and Vancouver". Then there is No. 29 which is the forefather of section 91 of the British North America Act: "The general Parliament shall have power to make laws for the peace, welfare and good government of the Federated Provinces (Saving the Sovereignty of England) and especially laws relating to the following subjects". Then they are enumerated, and the last which is No. 37 is: "And generally respecting all matters of a general character not specially and exclusively reserved for the local governments and legislatures", the corresponding provision is No. 43.

VISCOUNT HALDANE: That was not carried out.

MR. DUNCAN: The enumeration in both is just the same.

VISCOUNT HALDANE: There is no reference even to the enumeration in section 91.

MR. DUNCAN: They are in section 91.

VISCOUNT HALDANE: I think if your point is right attention is not directed to the fact that the Dominion Government were to remain with the power by enumeration.

MR. DUNCAN: It is: "and especially laws respecting the following subjects"; then comes regulation of trade and commerce, postal services, militia, military and naval services and defence and so on, banking and so on and legal tender. There are all those enumerations.

VISCOUNT HALDANE: What I mean is they speak as though the powers to legislate on peace, order and good government, or peace, welfare and good government were simply to be altered by these, but, as a matter of fact, they were not so, there was to be such a residuum as was left from section 92.

MR. DUNCAN: I am relying on that phrase in No. 2, that they are charged with matters of common interest to the whole country.

VISCOUNT HALDANE: No, that is just what they did not do.

MR. DUNCAN: I think so. There is No. 45 also which I have not read yet, and that is important. No. 43 says the local Legislatures shall have power to make laws respecting the following subjects. Then there is an enumeration very similar to this in section 92 of the British North America Act, and No. 15 is "property and civil rights except in those portions thereof assigned to the general Parliament"; then No. 18 is: "And generally all matters of a private and local nature not assigned to the general Parliament", the conception being in matters of common concern for the whole State the Dominion Parliament might legislate, and in matters that were local and of private concern the Provincial Parliament might legislate.

VISCOUNT HALDANE: I say that was not carried out.

MR. DUNCAN: I say in the Quebec Resolutions they intended to do that, and now I am coming to the other point.



VISCOUNT HALDANE: That is why I put in a word of warning about citing these Canadian Resolutions. There are points in which they were not carried out in the Act of Parliament.

Mr. DUNCAN: May I read No. 45; "In regard to all matters over which jurisdiction belongs to both the general and local Legislatures, the laws of the general Parliament shall control and supersede those made by the local Legislature, and the latter shall be void so far as they are repugnant to or inconsistent with the former."

VISCOUNT HALDANE: That is only true of the enumerated subjects in section 91?

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: What no doubt happened when the Canadian draft which Lord Carnarvon prepared was completed was they sent it over to Canada, and it was discussed there.

Mr. DUNCAN: I think there were Canadian delegates in London.

VISCOUNT HALDANE: With authority to vary it, they must have had.

Mr. DUNCAN: There was no further Quebec Conference.

VISCOUNT HALDANE: I believe there was not. They must have assented to the alterations in the draft, or else they never would have been passed.

Mr. DUNCAN: However, it was done, I do not think there is any question historically that those who came here thought that they were putting through an Act in accordance with the spirit of the Quebec Resolutions; there is no suggestion anywhere to the contrary.

VISCOUNT HALDANE: The spirit, certainly, not the letter.

Mr. DUNCAN: The Quebec Resolutions were framed at a most momentous Conference and with great care.

VISCOUNT HALDANE: I think so. I think you may put it here that nobody would assume responsibility for the exact words of the Act, but they said: This is the draft of the bill we have more or less agreed, and we recommend it to Parliament. Did you ever look at Lord Carnarvon's speech to see what he said?

Mr. DUNCAN: Yes, I do not remember what he said, but I have read it. I do not think there is any doubt, it has never been suggested in any historical book, and I have never seen any original document, that the people who agreed to the British North America Act thought they were getting anything other than what they had agreed to in the Quebec Resolutions; and that was the conception, as your Lordship said the other day, of Chief Justice Ritchie and Mr. Justice Strong. All people realized that, and it only began to be thrown the other way afterwards, not by 1896 Appeal Cases, but after that time, and principally, I suggest, it started in 1912.

VISCOUNT HALDANE: It was Ontario that did it.

Mr. DUNCAN: Yes, my Lord, I know Sir Oliver Mowat was the champion of the provinces, and by degrees Quebec and the other provinces began to back him up.

VISCOUNT HALDANE: They appeared in the Appeals; I recollect there was a great conflict.

Mr. DUNCAN: I submit to your Lordship, with all respect, that co-operation only appeared in 1912, that was when we first heard of co-operation.

VISCOUNT HALDANE: No. I held Sir Oliver Mowat's general retainer, so I ought to know.

Mr. DUNCAN: I also suggested to your Lordship if it is possible to interpret the British North America Act in accordance with the spirit of the Quebec Resolutions that should be done, if it can be done.

May I now turn to the two sections, and I shall be very brief on that. There are some propositions that I would ask your Lordships to agree to: First, may I mention the rather important case in 1914 Appeal Cases at page 237, *The Attorney General for the Commonwealth of Australia v. The Colonial Sugar Refining Company, Limited*?

VISCOUNT HALDANE: Take care how you endorse those words, otherwise another book will appear in Canada criticising you.

Mr. DUNCAN: May I refer your Lordship to a passage on page 253. If I may say so, I think this decision is precisely in point. All that your Lordships have at present before this board is the constitutionality of the substantive provisions of the Act, those appointing a board to inquire, and one or two ancillary provisions, that provision which gives the board power to subpoena witnesses and enter premises; the other provisions, the criminal provisions, are not before the board, although I accept the statement that one must look at them.

LORD ATKINSON: The provisions obliging them to work until the decision.

Mr. DUNCAN: That is not before the board. It has been held in this Court the Act can be divided.

VISCOUNT HALDANE: I am not clear about that. Is the only question before us the question as to the power to subpoena and search? Is there no question as to the power to stop the strike and fine?

Mr. DUNCAN: No.

VISCOUNT HALDANE: I thought the validity of the Act was before us?

LORD ATKINSON: I understood from Mr. Bevan that was one of the things you are entitled to look at to see the scope and purpose of the Act, and the scope of its invasion of civil rights.

VISCOUNT HALDANE: I thought Mr. Bevan was challenging the whole Act?

Mr. STUART BEVAN: Undoubtedly, I want to make that clear.

Mr. DUNCAN: I think my friend is challenging the whole Act. The matter arises in this way.

VISCOUNT HALDANE: Are there any instructions for any proceedings against him under the Act?

Mr. DUNCAN: Under those sections of the Act.

VISCOUNT HALDANE: I thought he put it generally?

Mr. STUART BEVAN: If your Lordship remembers it was some time ago. I asked your Lordships to be good enough to go through the provisions of the Act to see how far they invaded civil rights.

LORD SALVESEN: It may be the occasion of your challenge was limited to the subpoena.

Mr. STUART BEVAN: Well, my Lord, we had not arrived at the subpoena; we objected to the appointment of the board. The board would have then had to proceed to act in the matter, but it was upon the appointment of the board and the power that was given to the board by the Act that we applied for an injunction to prevent the board from sitting and from exercising any of the powers conferred by the Act upon it. The time had not come at which subpoenas had been served.

VISCOUNT HALDANE: It is open to us to say certain things are lawful enough and others are not; you *in limine* challenge the whole of it?

Mr. STUART BEVAN: Certainly.

Mr. DUNCAN: I understand my learned friend challenges the whole Act. I suggest to your Lordship the only case here is the subpoena. The matter arose in this way. The board was appointed under the Act by the Minister; the board held one or two sittings, and the plaintiffs in this action refused to recognize the board; they took the constitutional point that this is an *ultra vires* act and they



refused to recognize the board; they attended by counsel and made a formal protest. Then the board adjourned until I think it was the 20th of a certain month saying that on that date they would attend and hear such witnesses as wished to come before them, or words to that effect—my learned friend will correct me if I am wrong. There was no threat by the board of using its summary powers. Now the respondents are not relying on that, but I wish to make it clear to your Lordships how the matter arose. There was no threat of that, the matter was being fought out on a technicality there. The defendants could say there was no evidence on which Mr. Justice Orde could grant an injunction because the board never said it would exercise its compulsory powers, it merely said that they would sit on a certain day and proceed to hear certain parties that came before it. However, we are not as I say, relying on that point at all, because on the question at issue before the board we are here and wish the matter decided.

LORD WRENBURY: You say there is no such board?

Mr. DUNCAN: I say there is a board; my friend says there is no such board.

LORD WRENBURY: He says there is no such board, the Act never had effect at all.

Mr. DUNCAN: That is so.

VISCOUNT HALDANE: Never mind what its powers are, it is a number of people sitting at a table.

Mr. DUNCAN: Yes, and they issued a Writ endorsed asking for an injunction to restrain the board from exercising its power under the Act, and for a general declaration as to the Act being *ultra vires*. Now the only point before your Lordships is, assuming that the board was intending to exercise its compulsory powers if necessary, are those sections *ultra vires*. Now that is the case here in this case to which I refer; that was an Australian case in which the question came up of the power of the Central Government in Australia to appoint a Royal Commission to take evidence and report with power to subpoena witnesses and so on.

LORD ATKINSON: It is contended that the whole board is not legal, that the Act did not authorize its construction.

Mr. DUNCAN: Suppose my learned friend and I constituted ourselves a committee of two to investigate an alleged labour dispute, and we said: We will sit on Thursday next and we will hear such parties as come before us, can my learned friend go to the Court and get an injunction to restrain me from going on sitting?

VISCOUNT HALDANE: There is no law against that.

Mr. DUNCAN: He cannot get his injunction, his action fails. If I say that I will subpoena witnesses and enter premises then he in advance could.

VISCOUNT HALDANE: I am not sure about that.

Mr. DUNCAN: If my attitude is sufficiently fierce, and there is a real threat perhaps he can; we accept that.

VISCOUNT HALDANE: If you were to try to administer an oath you might get into trouble.

Mr. DUNCAN: We would have gone on to exercise the power given to the board. The criminal provisions are not before your Lordships, and it is on this branch of the case that the case to which I have referred, in 1914 Appeal Cases, is precisely in point. May I refer your Lordships to page 253, where the Lord Chancellor, Lord Haldane, delivering the judgment of the board, says: "But there remains the question which goes to the root of the controversy between the parties. Were the Royal Commissions Acts *intra vires* of the Common-

wealth Parliament? This is a question which can only be answered by examining the scheme of the Act of 1900, which established the Commonwealth Constitution. About the fundamental principle of that Constitution there can be no doubt. It is federal in the strict sense of the term, as a reference to what was established on a different footing in Canada shows. The British North America Act of 1867 commences with the preamble that the then provinces had expressed their desire to be federally united into one Dominion with a Constitution similar in principle to that of the United Kingdom."

May I pause there to refer to two sections in the British North America Act. The preamble says: "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom"—that is to say, the new State was to have a constitution similar in principle to that of the United Kingdom—"And whereas such a Union would conduce to the welfare of the provinces and promote the interests of the British Empire." That is the argument. Then, section 3: "It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three provinces shall form and be one Dominion under the name accordingly." Then section 5: "Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick."

VISCOUNT HALDANE: Nothing is said about the North West Territory there. How did that come in? Was there a special section?

MR. DUNCAN: There is a special section.

VISCOUNT HALDANE: How were they got in? I rather think it was by a section very late in the statute?

MR. DUNCAN: There is an Order in Council admitting Ruperts Land and the North West Territory.

VISCOUNT HALDANE: That is under statutory powers?

MR. DUNCAN: Yes, under an Order in Council.

MR. CLAUSON: In Mr. Munro's book there is an Order in Council of the 24th June, 1870, under the authority of section 146 of the Act.

LORD DUNEDIN: Rightly or wrongly, it is really settled in a way on which we could not go back, that the Australian constitution is federal and the Canadian constitution is not. The practical question is: Where is the residuum?

MR. DUNCAN: Yes.

LORD DUNEDIN: In the case of Australia the residuum is in the provinces, and in the case of Canada the residuum is in the Dominion.

MR. DUNCAN: Precisely, that is my point.

LORD DUNEDIN: I do not think you need labour that, because that is settled beyond all doubt.

VISCOUNT HALDANE: Whether it is federal or not is another question?

MR. DUNCAN: Yes.

LORD DUNEDIN: I am convicted of using the words of Lord Haldane. He says in this case that it is federal in the strict sense.

VISCOUNT HALDANE: I said so, and I say so still. There was some discussion in which I cited Professor Bryce, Mr. Dicey and Mr. John Austin, but



Professor Kennedy and some one from Harvard University cited authorities the other way, so what in the real sense is federal still remains to be settled, I hope not by this board.

Mr. DUNCAN: I am not interested in the definition at all. The decision, I take it, in this case was, after contrasting the two federations, your Lordships' Board said that in Canada the residuum lay with the Dominion and in Australia with the provinces or states, and your Lordships held that it was only because of that and because there was no creation of a central state, as in the case of Canada, that the Australian Commonwealth Government had not power to give its Royal Commission the right to subpoena witnesses.

VISCOUNT HALDANE: I do not think we said Canada would have had it, but we said: Certainly Australia had not got it.

Mr. DUNCAN: I wish to refer to the middle of page 254.

VISCOUNT HALDANE: I am sure we were not deciding on the principle of the Canadian constitution by an aside.

Mr. DUNCAN: I am not suggesting that, my Lord. I suggest that the difference between the Australian federation and the Canadian federation was that in Canada the provinces were united into one state with a constitution similar in principle to that of the United Kingdom, and certain defined powers were withdrawn from that State and given to the provinces, and the conception in section 91 and section 92 is that matters of national concern belong to the central government, and the enumerated matters are only those of a local and private nature and belong to the provinces.

Now, may I refer to the sections which are printed in the appendix. There are one or two points I should like to make; first, that there are matters outside the enumerations of section 91 and section 92. There will be no matters if interference is the test; it means there is no residuum. That is the effect of Mr. Justice Orde's judgment, and that is the conclusion to which both Mr. Justice Hodgins and Mr. Justice Ferguson are reluctantly driven by certain observations in decisions of your Lordships' Board.

LORD WRENBURY: Every act of legislation is an interference?

Mr. DUNCAN: Yes. Therefore that cannot be the test, and the argument has been destroyed by that very phrase: Does it interfere? Then there is no residuum, because it must interfere with some kind of property and civil right if those words are given their widest possible meaning. Therefore we come to aspect. It is not the incidence of the legislation which is important, but it is its aspect.

VISCOUNT HALDANE: There is another phrase which has been used pretty often "pith and substance".

Mr. DUNCAN: Yes. What is its pith and substance; is it clearly dealing with property and civil rights; is it changing them for that sole purpose, or is it changing them incidentally, although its purpose is something else?

VISCOUNT HALDANE: Is it in the exercise of some power which is given to the Dominion?

Mr. DUNCAN: Yes, on the question of ancillary provisions, raised by my Lord Atkinson, it has been held that the Dominion, legislating under its enumerated heads, has power to pass all reasonably necessary ancillary provisions to the end that the legislation may be completely effective. Why? Because the provisions which are truly ancillary take their aspect from the substantive provisions to which they are ancillary. I apply that same reasoning (and I suggest there can be no different reasoning) to legislation under the residuum. If the aspect of the substantive provisions is not in truth to alter civil rights or to deal with them, if it is not trying to do that, then the ancillary provisions, if they are truly ancillary and reasonably incidental, take their complexion from

the substantive provisions, and are of that aspect. As you find here, the substantive provisions are those providing for the establishment of a board to enquire; that is all. What could less affect property and civil rights, leaving out the ancillary provisions? What could be more innocent; what else could fall under the residuum; is there anything conceivable that could fall under the residuum that is more innocuous, from the point of view of property and civil rights, than enquiry? It is inconceivable. The ancillary provisions are the only provisions which are challenged. I will deal with all the ancillary provisions.

LORD ATKINSON: They are made for a particular purpose, and the machinery that is set up to effect that purpose does interfere with civil rights.

Mr. DUNCAN: The ancillary provisions.

LORD ATKINSON: I do not see how you could disjoint the thing so as to consider the two clauses providing for the creation and meeting of the board, without looking at what they can do when they have met, and how they can do it.

Mr. DUNCAN: I suggest it is a well-known recognized way of examining statutes by this board under the British North America Act.

LORD DUNEDIN: I think you would get out of a good deal of trouble and criticism if, instead of using the phrase "interference with civil rights," you used the phrase "dealing with civil rights." Taking the matter under section 92, civil rights, you never deal with civil rights legislation without interfering with civil rights at the same time, and, therefore, when you say interference is no test I agree with you it is not a test, but "dealing with" may be a test; that is to say, this may be legislation which deals with civil rights, and, as such, is *prima facie* within section 92.

Mr. DUNCAN: Yes.

LORD DUNEDIN: Then you have to show that for some reason or other it has, so to speak, swelled to such a magnitude that the evil which is wanted to be cured can no longer be dealt with as a civil right under section 92, but under the residuum of power, which is under section 91.

Mr. DUNCAN: Yes.

LORD WRENBURY: Every man has a civil right, but the civil right with which it is suggested the legislation is interfering is the collective right of everybody; it is the whole community. They are not dealing with the individual right of a particular person?

Mr. DUNCAN: That is so.

LORD WRENBURY: Your contention would be that when you get such a state of things that what you are dealing with is not the right of the individual as distinguished from the right of the community, then you fall into the Dominion?

Mr. DUNCAN: Yes. May I say one more word, and I will pass from this subject. May I endeavour to emphasize the distinction between section 91 and section 92, section 91 dealing with matters of national concern and section 92 only with matters of local and private concern. The clause at the end of section 91, I submit, gives the interpretation that all that is in section 92 is of a local and private nature; and the clause at the end of section 92 also makes it clear that the antithesis is between matters of national concern and those of a small and local private nature; and I say all the enumerations in section 92 are coloured by that phrase. "Any matter coming within any of the classes of subjects enumerated in this section"—that is, in section 91—"shall not be deemed to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects by this exclusively assigned to the legislatures of the provinces." I say that is directly following the Quebec Resolutions. It



characterises all the matters in section 92 that they are of the class of matters of a local or private nature, and, further, at the end of section 92 the provinces are given authority to make laws generally of a merely local or private nature in the province. I submit, if it is truly dealing with a local or a private matter in the province, the Dominion cannot do it, except under an enumerated head, and that is why this clause at the end of section 92 is put in, that under the enumerated heads the Dominion can deal with a local and private matter, such as insolvency or banking, or whatever it may be; but, if it comes under peace, order and good government, the province cannot be interfered with, and they cannot go into the matter of its dealing with a matter of a local or private nature as such, but, if, as Lord Watson says, it has ceased to be local and private, that is another matter.

LORD ATKINSON: He did not say that. He said the thing to be dealt with had so expanded that it became a Dominion and not a provincial matter?

Mr. DUNCAN: Yes.

LORD ATKINSON: So as to get outside that enumeration?

Mr. DUNCAN: Yes, just as in 1867 the local trades associations would have been virtually local matters. Now they extend across the whole of Canada, without regard to provincial boundaries, and they are controlled in many cases from outside the country, and there is no Government in a position to deal with them except the central Government, firstly, because of their organization; secondly, because of the effect of strikes on Dominion trade throughout the country; and, thirdly, because of class feeling, which also pervades the Dominion and makes it impossible to say in advance whether any one strike will be local or not. The fact that it breaks out locally, I submit, is not the criterion. The fact that it must be dealt with locally, even under the Dominion Act, is not the test. Everything is localized in some province.

LORD ATKINSON: One of my difficulties in following it is this. If all fact is to be set aside, there is not a single one of these things enumerated in section 92 that the Dominion could not deal with. They could say: We think the solemnization of marriage in Ontario is a subject on which we ought to legislate, and accordingly do so, because they think it is of importance that they should do so.

LORD DUNEDIN: I think your answer to that must be that it is exceedingly improbable, probably impossible, that each and all of the separate headings of section 92 should be, so to speak, too small. Supposing you found that all over Canada it was proclaimed that the best form of marriage was free love, and the central Government thought that was absolutely destructive of the kingdom, could not they then do something?

Mr. DUNCAN: I should fancy they could.

LORD DUNEDIN: Of course, I have put a very absurd case. I think the real answer is the absurdity of the illustration which I put, but a great many of those subdivisions never could assume what I may call a national aspect.

VISCOUNT HALDANE: Marriage has been the subject of a decision of this board.

Mr. DUNCAN: Yes, my Lord.

VISCOUNT HALDANE: It has been touched in other cases, but there is one main one.

Mr. DUNCAN: May I refer your Lordships to the place where this matter is discussed by Mr. Justice Clement. At page 376 he says: "To what extent the Courts may, in deciding such a question of fact, take judicial notice of conditions political, social and industrial through the Dominion may be a very difficult problem. It was held in an early case that the onus is on those who

assert that a matter in itself local or provincial does not come within one of the enumerated classes of section 91; and it may well be argued that the onus would be still harder to satisfy if it were sought to have it established that the matter was unquestionably one of Canadian interest and importance."

VISCOUNT HALDANE: That is, the matter was one of Canadian concern.

LORD ATKINSON: If there is anything laid down there positively it is that it is a very difficult thing to prove. That does not mean that you may dispense with proof.

Mr. DUNCAN: I suggest, with respect, that I have discharged the onus.

Now may I turn to the evidence on that, because it is a question of evidence. Summarising my position it is this: Looked at in its true aspect, here you have legislation which is not in relation to any of the provisions in section 92, although it may interfere with some of them; and, therefore, it falls within Dominion power, and the board is not called upon to decide whether it falls under peace, order and good government or under trade and commerce or Criminal Law.

LORD WRENBURY: I suppose you would say, assuming it is not within any one of the enumerated matters in section 91, if you are right in saying it is not within section 92 it does not matter?

VISCOUNT HALDANE: That is under peace, order and good government. It makes a great difference to us under section 91. Then, if it comes at all under section 92, you can interfere, if it does come within the enumerated heads of section 91, but merely under peace, order and good government, then, if there is interference, it is not legal interference.

Mr. DUNCAN: That is using the term "interfering".

VISCOUNT HALDANE: Well, trenching.

Mr. DUNCAN: If it is dealing with.

LORD ATKINSON: It has been decided over and over again that the Dominion cannot take advantage of peace, order and good government to legislate to take away any of the things enumerated in section 91.

Mr. DUNCAN: I quite agree, my Lord.

LORD ATKINSON: And peace, order and good government may be used for another purpose, but that leaves untouched the contention that what is primarily local and provincial may swell into something that is national.

Mr. DUNCAN: May I seek to develop that from the evidence?

LORD WRENBURY: That is the very language of the Act. It is in relation to matters not coming within section 92.

Mr. DUNCAN: May I endeavour to satisfy your Lordships that this is a matter of national concern, although originally local and private? On the argument of inconvenience, I say if it is extremely inconvenient to get co-operative action by the provinces, then you can say that it is reasonably within the jurisdiction of the Dominion, because we assume that it is necessary to do something by collective action or in some way; it is necessary to do something throughout Canada. Once you get to that stage, surely it falls within the Dominion, if it is of concern, not from a provincial point of view, but in each province, by reason of national interest. The doctrine of co-operation would be extraordinarily inconvenient. In the American federation they had what they considered the terrible example of the loose confederation which preceded the American Union, in which the central Government could not act directly on each State citizen, but had to act directly on each State Government and ask them to do so-and-so. There were little States, semi-independent, under a loose sort of League of Nations arrangement.

LORD ATKINSON: Take the great Pittsburg strike in the Carnegie Works. The Governor of the State refused to give the forces of the State to put it down,



and ultimately the Federal Forces were used, but only on the pretence, or contrivance one might call it, that the strike impeded and delayed the Federal mails, and that was a Federal concern, and, therefore, Federal troops might be legitimately used to get rid of the difficulty.

Mr. DUNCAN: I am obliged to your Lordship for the illustration. May I apply it to this case and our country? If the decision of this board is against the contention of the respondents, we can only by a device such as that use the Militia to quell a strike. There are no Militia of the province. There are Militia in every State of the United States. As this evidence shows in practical operation you must call on the Militia where a large strike develops. You call on them because the Police are not adequate. You cannot maintain a great mass of Police for a threatened or supposed contingency, and application is at once made to the Militia. I say here it would be a case of chopping up the jurisdiction in the most unfortunate way. If it is possible for your Lordships to decide either way, as I submit it is, that it is open, and you are not bound, there would be by that decision a most unfortunate cross-section of jurisdiction, because, in matters of legislative jurisdiction, the line runs between matters truly of national concern and those of local concern, and not a threefold division line between matters of national concern and matters of provincial concern, and another line athwart matters of national concern, within which third field only the combined provinces, acting by their local legislatures in concert, can act. There is no such conception in the British North America Act.

LORD ATKINSON: There is no conception of the provinces acting together.

Mr. DUNCAN: That is the suggestion of co-operation.

LORD ATKINSON: They may if they like, but an arrangement such as that is not contemplated by the Act.

Mr. DUNCAN: No.

LORD ATKINSON: There is nothing to prevent it.

Mr. DUNCAN: No, if they wanted to, but presumably they do so because it is of national concern, but has not reached the point of emergency; it is something of national concern, but not emergency such as a war, or famine, or plague, but it is of national gravity and concern calling for action by each of the provinces. Turning to Mr. Gunn's evidence at page 31 he says that he is an official of the Toronto Branch of the Canadian Electrical Trades Union; the Union had branches in every province, and the Toronto branch had jurisdiction over various cities in Ontario; all cities and towns covered by the Central Ontario System of the Ontario Hydro Electric Commission. The Ontario Hydro Electric Commission is a Government Commission which was appointed after the Government bought or expropriated all the private companies which distribute electricity from Niagara Falls, and, as your Lordships I am sure are quite aware from cases that have come before you, there is a monopoly of the supply and distribution of electricity in the province of Ontario, all in the Hydro Electric System.

VISCOUNT HALDANE: Take Toronto itself. Are there any generating establishments except those of the Hydro Electric Commission?

Mr. DUNCAN: No, there is only one very small concern which only supplies itself.

VISCOUNT HALDANE: There is no absolute monopoly.

Mr. DUNCAN: There is for all practical purposes because it is only one company.

VISCOUNT HALDANE: They supply electricity exclusively.

Mr. DUNCAN: Yes.

VISCOUNT HALDANE: The Provincial Government does it?

Mr. DUNCAN: Yes. The province has passed an Act permitting the City of Toronto to do it for the city.

LORD ATKINSON: The province outside of the City of Toronto has nationalized the electric distribution.

Mr. DUNCAN: Yes, for all practical purposes.

LORD DUNEDIN: Is that for the supply of electric current, or does it go further and apply to all electrical appliances.

Mr. DUNCAN: It is only the supply of electrical current. When I say it is nationalized I do not mean to say that a private citizen or company may not start up his own concern for his own use.

VISCOUNT HALDANE: He may get an oil engine and buy a dynamo.

Mr. DUNCAN: Yes, but practically all our electricity comes from the Niagara Falls.

VISCOUNT HALDANE: Light as well as power?

Mr. DUNCAN: Yes. What was done was to buy up these companies and create the Ontario Hydro Electric Commission which controls the distribution of electricity throughout the province. Many monopolists have done the same thing in their own sphere. There were little distribution companies in the various cities, and they have created commissions which have taken them over, and the distribution in Toronto, as far as this case is concerned, is first from Niagara Falls under the Provincial Commission, and then throughout Toronto by these plaintiffs, and they are monopolists in the distribution of electricity, and any strike if it was effective would at once stop all the distribution of electricity in Toronto.

LORD WRENBURY: The first evidence is the defendant's evidence. Did the plaintiff call any evidence?

Mr. DUNCAN: Not originally.

LORD DUNEDIN: They put in their documentary evidence?

Mr. DUNCAN: Yes, my Lord. My learned friend Mr. Stuart Bevan corrects what might be a misapprehension. It is not illegal for anybody else to supply electricity, but in fact it would not be commercially possible, because of the low rates of the Ontario Commission which supplies at cost. As far as these plaintiffs are concerned, they are the monopolists in the supply of electricity in Toronto, and if a strike was effective or had been effective here, it would at once have cut off all the electricity in the City of Toronto, and it would have stopped every manufacturing concern that depends on it. The evidence shows that the manufacturing concerns, and there are many of them in Toronto, are dependent on electricity, in fact 85 to 90 per cent of all the concerns; that is to say, only about 10 to 15 per cent have their own steam plants, and they depend on steam power, but the remainder of manufacture in Toronto depends absolutely on electricity.

VISCOUNT HALDANE: It would be interesting to hear how many cents per unit is the average charge?

Mr. ROBINSON: It is 2 cents a unit up to the first 10,000 units.

Mr. DUNCAN: May I refer your Lordships first to the evidence on page 127. These three witnesses from three of the principal manufacturing concerns in Canada all appeared on subpoena, not that they were reluctant to come.

LORD ATKINSON: I think all this evidence would make an unanswerable case for having an Act for itself.

Mr. DUNCAN: Yes, but the point is the effect outside Toronto. "You are from the Massey Harris Company." They manufacture farm implements which are used throughout Canada, and there is also a great foreign trade in Argentina, Russia, and Australia. "Is your plant dependent upon electric



power, and if so, to what extent? (A) About 90 per cent. (Q) What would be the effect on your business by the interruption of the supply of electric power? (A) Practically all of the plant would have to be closed down immediately. (Q) What effect would that have on the actual manufacturing processes? (A) Naturally, it would put the manufacturing processes out of business. The whole plant, with the exception of two departments, is entirely motorised—speaking of the Toronto works—including all of the elevators, and any shut-off of power, as sometimes occurs, puts the plant out of business.” He is speaking of elevators. They have many large buildings, and a machine commences on the first floor; it is assembled and it proceeds down the floor, passing one workman after another, and at the end of the floor it is put on a lift or an elevator, and goes up to the next floor, and it is a continuous process; it never stops. “Have you a foreign trade? (A) Yes. (Q) Would a shut-off of electric power in any way interfere with your foreign trade? (A) Naturally. (Q) In what way? (A) It would naturally shut off all manufacturing and practically all shipping, our warehouses being four and five storeys high. (Q) Yes? (A) And the effect in a good many cases would be, where we have the tonnage contracted for, to miss the shipping connections, and consequently the foreign markets and seasons. (Q) What about the effect in Canada? (Mr. Kilmer) Is this witness an expert? You have already called three. (His Lordship) This witness is called to show that the abstention of buyers from purchasing Massey Harris machinery would be a national calamity. (Mr. Duncan) What is the extent of your business in Canada? (A) What do you mean by that? (Q) Do you ship into other provinces of Canada? (A) Yes, into all provinces. (Q) And might a disturbance such as the shutting off of the electric power have the same effect? (A) Yes. (Q) What effect would that have on your employees? (A) Naturally, they would be out of employment.” Followed of course by disturbance, a possibility of riots, the congregation of large numbers of men out of employment and so forth.

Now I will turn to the evidence of Mr. Coffey on the next page.

LORD SALVESEN: These are the familiar results of all strikes under modern conditions. Their effects are not confined to the particular industry in which the strike occurs. It necessarily spreads to a great many others which are dependent upon them.

Mr. DUNCAN: Yes, it is chronic throughout the state, and not chronic in a province.

LORD SALVESEN: Specially when you are dealing with a source of power. We had the same thing with the coal here. If you stop coal mining you stop other industries.

Mr. DUNCAN: I am obliged to your Lordship for the illustration. If you went back to the days of the Heptarchy here, and were unfortunately placed under a system of federalism under which England was divided into four provinces, and a strike of some works took place in Wales and that spread, and it was likely to spread to the transport workers in other parts, would the matter be of national or Provincial concern?

LORD SALVESEN: Primarily it is of Provincial concern, but it may also be of national concern.

Mr. DUNCAN: Is not the question my friends have to ask: Can we point to strikes and say in advance, this cannot be of national concern. Can they support the proposition that strikes are so seldom of national concern that the onus is on the Dominion only to deal with strikes which the Dominion must prove to each province are of national concern before it can act.

VISCOUNT HALDANE: It would probably be much more convenient to have the Lemieux Act operative all over Canada. I am disposed to agree with you there, but one has to take into account Provincial susceptibilities.

Mr. DUNCAN: One can see that from Provincial legislation; none of it is operative.

VISCOUNT HALDANE: That may be for many reasons. We have nothing to do with that here.

LORD DUNEDIN: Perhaps this is not a fair question. Do you think the reason that the Provincial people have left this legislation alone has been that they do not like it, or because they think the thing has been so effectively done by the Dominion legislation that they need not touch it?

Mr. DUNCAN: I suggest a third reason, which is this, that they consider it is within Dominion jurisdiction.

LORD DUNEDIN: That would be my second branch.

Mr. DUNCAN: I thought your Lordship meant effective in its operation?

LORD DUNEDIN: You have told us a great many of the provinces have not touched the thing at all. One of them had an Act and then let it be repealed. The one reason might be that the Province did not like the legislation, but the other might be that they were so satisfied with the operation of the Lemieux Act that they could not do anything more.

Mr. DUNCAN: I would adhere to the last suggestion if I could guess.

VISCOUNT HALDANE: You must not shut out Provincial rights even though the province think a Dominion law would be better.

Mr. DUNCAN: Your Lordship will remember that in 1871 the Dominion Parliament passed a Trade Unions Act which removed the criminal taint from trade unions, and it also removed the civil bar to recover. That Act was passed by Sir John Macdonald after a strike which is referred to in this evidence; it took place in Toronto among the printers on the "Globe" newspaper, which is a very powerful newspaper of liberal leanings. The printers went on strike, and they were indicted for criminal conspiracy, and they were arrested. Sir John Macdonald, who was an acute Conservative, said: We will pass a Trade Unions Act, and he did in practically the same words as the English Act, which dealt with criminal law and civil rights. No province has ever passed a Trade Unions Act or ever touched the matter covered by that section of the Trade Unions Act.

LORD ATKINSON: Was that a Dominion Act?

Mr. DUNCAN: Yes.

LORD ATKINSON: In those days Sir John Macdonald thought the Dominion had power to pass all sorts of Acts.

Mr. DUNCAN: Because he was close to the Quebec Resolutions.

VISCOUNT HALDANE: I wonder they have not brought up more of the Acts of that time to review before this Board.

Mr. DUNCAN: In *Russell v. The Queen* the Board did take his view, and even Lord Watson in the McCarthy case did not go to the length of giving a judgment upsetting *Russell v. The Queen*, although I do not say that has not been done by several subsequent judgments of the Board.

LORD ATKINSON: Some of his other judgments make it plain that he would have liked to do so.

Mr. DUNCAN: Yes.

Now I come to the evidence of Mr. Coffey, which is very short, at page 129. He is the Factory Manager of the Gutta Percha Rubber Co. Ltd., who manufacture great quantities of galoshes and all sort of rubber goods, tyres for motor cars, and so forth.

VISCOUNT HALDANE: I have read all this evidence, and I may say I agree with it. As I have said from the point of view of convenience there is a great deal to be said in favour of what you say.



Mr. DUNCAN: It is only directed to the suggestion in the case in 1896 Appeal Cases that matters of local and private interest can attain Dominion proportions. I wish to demonstrate that from the evidence.

LORD ATKINSON: If the supply of electricity in Toronto goes, the products of manufacture may go, but there is nothing to prevent Toronto itself getting an Act, and, as far as the manufacturers are concerned, bringing about exactly the same result.

Mr. DUNCAN: May I apply the interference rule to that, but looking at it from the point of view of Dominion jurisdiction. We have trade and commerce. The regulation of that is within the exclusive jurisdiction of the Dominion, whatever that may mean, but the regulation of trade and commerce falls under Dominion jurisdiction. Any provincial act or abstention which really prejudiced or interfered with trade and commerce in its uninterrupted flow would be an interference with that, and if the interference rule is the test, such a provincial Act would be *ultra vires*. Supposing in Ontario we had a Communist Government, who said: We will do away with laws against strikes, not for a political purpose directly, but to interfere with trade and commerce, and bring the Dominion to its knees, is not that interference?

VISCOUNT HALDANE: When you get such a case you will come before us, and we will say what we have to say, but we have not got it yet.

Mr. DUNCAN: Your Lordship has been putting to me most inconvenient examples which I have had to answer on the spur of the moment.

May I go on with Mr. Coffey's evidence: "What would happen if the supply was interfered with? (A) If the supply was cut off we would be shut down; we have no spare sets at all, and would be entirely dependent upon the continuity of service power. (Q) Have you any foreign trade? (A) We have. (Q) What would be the effect on that trade? (A) It would all depend upon the duration of the shut down. (Q) Will you explain? (A) We have warehouses with stocks of goods and if the duration of the shut down of electric power was of sufficient length to deplete these stocks, or if we were making up specials for shipment for export orders, it would interfere with the despatch of the goods."

LORD DUNEDIN: Hitherto what you have really said only comes to this. I do not mean by saying "only" that I want to minimise it, but it comes to this: We have big businesses; the stoppage of electricity would stop the businesses, and the result would be that the products of our businesses, which go far beyond our own province, would be stopped and that would be an hindrance to other parts of Canada which take our products. That is one class of thing. I do not know that you have any illustration of the class of thing which Lord Salvesen spoke of, of which the best illustration would be if you stop coal production you stop the steel and iron works which might be in another province. I do not know whether you have those. I wanted to know if you have anything coming in another class of category. There may be other categories than those two. I do not see that there is much use in examining a set of witnesses. One is quite prepared to take it that there are many businesses in Toronto which if stopped would have their products stopped, and other people outside the boundaries of the province would suffer. That is a very simple proposition.

Mr. DUNCAN: What else have you?

LORD SALVESEN: Possibly a great many people might fall out of employment in addition to those who were striking.

Mr. DUNCAN: Yes.

LORD ATKINSON: Could not they generate electricity for themselves?

Mr. DUNCAN: They could not.

LORD ATKINSON: Why not?

MR. DUNCAN: Because the businesses are all prepared for electric power. All the steam plant has been taken out.

LORD ATKINSON: Could not they bring electricity into Toronto with an Act of Parliament?

MR. DUNCAN: In time that could be done. This is on the basis of something sudden, interfering at once with the supply, and one could not wait for an Act of the Ontario Legislature.

LORD ATKINSON: You may put it that as the generation of power by water is monopolized you would have to set up another system, and I suppose the only other systems of generation could be coal or oil. Practically as far as I know up to the present time they have never managed anything with the tides, so that really water, oil and the coal are the other only practical methods of generating electricity on a large scale.

MR. DUNCAN: Yes, my Lord. With regard to Lord Salvesen's question as to other interferences, the evidence shows that Toronto is a great producing as well as purchasing centre. The products of Toronto, and they are extraordinarily numerous, large and important, go either as completely manufactured or in a semi-manufactured state to other provinces in Canada, and are there either used for the necessities of life or are further manufactured. So that it would affect other provinces, and further, turning to the consuming portion, Toronto has an enormous pay roll, and a strike of this key industry would throw out of employment hundreds of thousands of men at once and would deprive Toronto of great purchasing power, and that would affect people in other parts of the country. There is not only the purchasing power, but let me turn to the manufacturers. There is evidence from one of the great meat people, Gunns Ltd., who buy hogs and cattle from all over the Dominion. They bring them to Toronto, slaughter them, and put them in cold storage, export them and send them to other parts of Canada. General Gunn says in his evidence that a strike would stop their processes, and that would have an effect on the farming community throughout the whole of Canada. From the point of view of Dominion trade, it is of such importance, I submit, that it falls within Dominion jurisdiction under the principle in the case in 1896 Appeal Cases.

May I refer your Lordships very shortly to the statistics, which are always dry. They begin at page 232 to page 235. On page 232 they are manufactured products only. It gives the value of the products for the years 1917, 1918, 1919, and 1920. In 1917 the amount was 456 million dollars per annum; in 1920, 588 million dollars per annum; that is for Toronto. Then for the whole of Canada it was 3 billion dollars, and Toronto was 15 per cent of the total. The manufactures of the Maritime Provinces, that is the three provinces, were 244 million dollars less than Toronto itself, one city of Ontario. The Prairie Provinces are less than Toronto, and all the provinces west of Ontario right to the Pacific coast, 406 million dollars, about equal to Toronto.

VISCOUNT HALDANE: Of course you must remember that although agriculture is beginning to use electricity it has not done it in Canada to a very large extent.

MR. DUNCAN: Yes, but this is electricity supplied to the firms by the Commission.

LORD SALVESEN: It comes to this, if you had a local Act in Ontario you could not enforce it directly by means of the Militia, whereas this general Act can be enforced by the Government by means of the militia. The difficulty is not avoided by having an Act which provides for a means of enforcing a thing. You might find a thing disobeyed and you would be back on the militia.

MR. DUNCAN: Yes.



LORD SALVESEN: This is probably a most useful Act as a preventative of strikes by prolonging the time of consideration.

Mr. DUNCAN: That is all it does.

LORD SALVESEN: You could pass that part of it anyhow.

Mr. DUNCAN: That is attacked by my learned friends. They say this interferes with a civil right.

VISCOUNT HALDANE: Labour takes an exception to it.

Mr. DUNCAN: Labour I think accepts those provisions of the Act as being desirable in the interests of Canada.

The other statistics are all of a similar kind. On page 234 are shown different kinds of establishments in Toronto.

LORD ATKINSON: I suppose we have evidence as to what is being done in other provinces.

Mr. DUNCAN: The situation is the same throughout Canada, Toronto and Montreal being the two nerve centres in manufacture.

VISCOUNT HALDANE: In Alberta and Saskatchewan they do not use electricity to the same extent as in Ontario?

Mr. DUNCAN: No. I suggest that your Lordships might take judicial cognizance of industrial conditions throughout the Dominion. A strike of any serious nature in any one province has effects far beyond the province, and I submit that you must look at the Dominion as an economic whole; that the conception economically is one nation; the others are only political divisions, and that economic trade and commerce falls to the regulation of the Dominion, and the Dominion has power to preserve what it has power to regulate.

VISCOUNT HALDANE: Is there much more in this evidence? It is all consistent with what you say.

Mr. DUNCAN: There is some most important evidence of Mr. Murdock and Lieutenant-Colonel Orde.

LORD DUNEDIN: On what point?

Mr. DUNCAN: Lieutenant-Colonel Orde says that at the time this application was made for the appointment of the board there was a strike in Nova Scotia, and all the available militia from as far west as Winnipeg had been drafted to the scene of trouble..

LORD SALVESEN: The difficulty would have been the same if they had refused to obey the order of the board?

Mr. DUNCAN: It is put there for this purpose, to show that, as industrial conditions now are in Canada with the present organization of labour, the subject matter is one which can only be dealt with properly by one government which controls the militia and must watch the outbreak of strikes or the threatened outbreak of strikes in every part of the country, and must, if necessary, be able to so dispose its troops as to deal with the matter.

VISCOUNT HALDANE: You seem to suggest that they had an inadequate force of militia, because they could only deal with one strike.

Mr. DUNCAN: The fact that the militia was not in sufficient numbers shows that at the time when this application was made the situation was critical and very serious. We did not have enough militia to cope with the situation. That shows there was something very similar to what happened at Winnipeg, though I do not suggest it was Winnipeg over again, but something very critical. The minister himself said that the situation was that he was receiving protests from other provinces. There was an application just afterwards for the appointment of a board at Montreal. There it was not a municipal distribution, but a company which was distributing electricity.

LORD DUNEDIN: Does not that argument come to this: The central Government is the only body that possesses the coercive forces which may be necessary to deal with the lawlessness which may result from strikes, and, therefore, it is very necessary for the Central Government to keep off strikes as much as it can? If it is allowed to have an Act of its own like this it does its best all over the country; if it is not then it cannot do anything of itself, and it is at the mercy of what you call co-operative action. Is that the argument?

Mr. DUNCAN: Yes.

LORD WRENBURY: A strike of transport workers may starve the country, and it is the duty of the Dominion to save the country from starvation. In the case of a strike the only militia at the disposal of the authorities is the Dominion forces?

Mr. DUNCAN: That is the idea. I do not think my friend can drive me into this. He says: Under the Lemieux Act you may have a strike of ten people in a village. That could not possibly be a Dominion concern.

VISCOUNT HALDANE: That is Police.

Mr. DUNCAN: I say if a strike is of national concern you have to take hold of every industry. You cannot say in such and such industries there is no danger of a general strike.

LORD DUNEDIN: Your answer is that the greater includes the less?

VISCOUNT HALDANE: As you know, all over this country there is intense feeling against the military being called in, and one result of that is that the police have been very much strengthened and made more mobile, and nearly always police are quite sufficient. I have known them not to be sufficient when I was at the War Office, but it was very rare. Probably if the militia were needed in a supreme emergency the Dominion would send them, without any Act.

Mr. DUNCAN: Yes, your Lordship has touched on a matter of great moment which is involved in this case.

LORD ATKINSON: Would not the Dominion be bound to keep order?

VISCOUNT HALDANE: In the United States, Federal Troops were called out by the State Governor. The Federal Government was, of course, willing to send them. They got a summons from the State Governor: Come to my aid; or from the sheriff, I think it was.

Mr. DUNCAN: On the question of Police, Police is a subject not mentioned in either section 91 or section 92.

VISCOUNT HALDANE: But it is plainly under section 92.

Mr. DUNCAN: Would your Lordships hold that there is authority to create Dominion Police to go into the provinces?

VISCOUNT HALDANE: I do not know. They might have a sort of implied Police power, like the Federal Government in the United States.

Mr. DUNCAN: Would it be an implied power? Must not we find our power expressed in the constitution?

VISCOUNT HALDANE: That has not been so in the United States. I refer you to the decision in *Harrington v. The State of Georgia*, which is reported in 62 United States Reports, and also the authorities connected with Willoughby on the Constitution of the United States. I think you will find there are Police powers, both State and Federal.

Mr. DUNCAN: May I give your Lordships the references to three American cases on the regulation of trade and commerce?

VISCOUNT HALDANE: What do you want them for?

Mr. DUNCAN: To indicate that even under the much less simple regulation clauses in the United States Constitution there is power to deal in the national interest with matters which affect trade and commerce.



VISCOUNT HALDANE: There is trade and commerce under the trade and commerce article in the Constitution, and there is also Police power.

Mr. DUNCAN: I suggest only following from these three cases which I wish to cite.

VISCOUNT HALDANE: No, following from the constitution.

Mr. DUNCAN: As first interpreted by these three cases.

VISCOUNT HALDANE: You need not cite authority for that.

LORD ATKINSON: I cannot understand why the Government cannot insist on maintaining order. A Government that does not maintain order is no Government at all; it is chaos.

VISCOUNT HALDANE: If the province wanted the Dominion to assist it and the Dominion was willing, there is no doubt the Dominion could rightly use the Militia for that purpose?

Mr. DUNCAN: Yes, my Lord.

LORD ATKINSON: That would be peace, order and good government.

VISCOUNT HALDANE: I think the evidence is all summed up in the statement that this is very convenient.

Mr. DUNCAN: It is vital.

VISCOUNT HALDANE: I said convenient.

*(Adjourned to Monday morning next at 10.30).*

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## FIFTH DAY

COUNCIL CHAMBER, WHITEHALL, S.W. 1,

MONDAY, November 24, 1924.

Sir JOHN SIMON: My Lords, I tender my apologies to the Board because I have not been physically present, owing to circumstances, which, I think your Lordships will realise, were rather exceptional, but I have taken the most abundant care to make myself acquainted with all that has passed, and I think I can promise that, if I take advantage of your Lordships' indulgence and ask if I may add a few words to my friend Mr. Duncan's argument, I shall be able to do it with the knowledge of what has already passed. My friend Mr. Duncan has taken the labouring oar here, and I need hardly say that I am very greatly indebted to him, as I have no doubt the Board is. What I wish to do is to submit to the Board in very compendious terms what further appears to us important to argue for the respondents, and I will do it quite briefly, remembering, of course, that your Lordships, in view of the importance of this case, would be willing, besides hearing me, to hear my friend Mr. Clauson for the Attorney General for Canada, and remembering that the Attorney General for Canada will be able to speak through his own counsel.

My Lords, the point which my friend Mr. Duncan has been urging, and which, I have no doubt, is fully before your Lordships' minds as the real centre of our argument, is, if we may eschew the language of metaphor and of the phrasology, which is not precisely the phraseology of the British North America Act, the real test of the matter is whether or not a particular piece of legislation is a piece of legislation which, in the actual words of these two sections, comes within a class of subjects, or, rather, whether it is in relation to a matter which comes within a class of subjects here listed. Other expressions, such as interfere with or trench upon, are very valuable, of course, as being a judicial exposition of what must be considered, but, after all, the actual question, if we put it

in the terms of the statute, is: Taking this legislation, is it legislation with regard to a matter coming within a class of subjects listed, and, if so, what class? I observe that in the course of the argument on Friday that there was some debate as to whether or not that is exactly the same thing as seeing whether it interferes with. I merely give a single instance as I go along, because I want to get to the heart of the argument here without more analogy. Take this illustration, this is a very simple one: Supposing that you have before you a piece of legislation which provided for the laying down of mains underground in a street, it might be for the purpose of sanitation or electric supply, or what not, there can be no question at all that such legislation interferes with street traffic; there cannot be the least doubt about that; it might prevent it altogether for a long period of time, but none the less, it would obviously be a wrong classification to say that that as legislation trenched upon or came within a head, if there was such a head, of street traffic, because, after all, the class of subject which is being dealt with, and the matter in relation to which the legislation operates and is passed, is nothing to do with street traffic, though it very grievously interferes with it. That is a mere illustration, of which all your Lordships are perfectly apprised of more important instances.

My Lords, this is my point. If you take the record and look at Mr. Justice Orde's judgment, you will see that the learned Judge fell into a very grave error in his view of the scope of this legislation. It is on page 9. There is no authority for saying that in judging whether one of these Canadian enactments is or is not *intra vires* one has to look at the enactment as a whole, or, at any rate, has to consider it by reading it as a whole, and the learned Judge, Mr. Justice Orde, with great respect to him, whether his ultimate decision is right or wrong, has grievously misapprehended and exaggerated what this statute does. May I read to your Lordships—it has not been read since the beginning of the argument I think—a few lines from page 9, beginning at line 7? He describes this portion of the statute in these words: "Sections 56 to 59 contain extremely drastic provisions designed to preserve the status quo from the moment the Minister grants the application for a board until it has made its report."—I ask your Lordships to observe this sentence—"Notwithstanding that the several contracts of employment may have come to an end, or be subject to cancellation for cause, neither the employers on the one hand nor the employees on the other, can exercise their ordinary civil rights of bringing the engagement to an end, or of refusing to renew upon the same terms, if either party sees fit to apply for a Board of Conciliation, without subjecting themselves to serious penalties." While I agree that if that was indeed an accurate description of this statute my task for the respondents would be a far more difficult one, if you turn to the Joint Appendix, at page 53, you will see that the learned Judge in that passage has quite misunderstood what is the scope of this legislation. It is not true that the result of this legislation is to prevent a contract of employment expiring, or to prevent the dismissal of a man for cause, or to prevent the determination, in the course of the ordinary civil right of an ordinary individual, whether of the employer or workman, of any contract that is going on. All those things remain exactly as they were before. The only thing which the statute deals with is this: It holds, I agree, in suspense the power, if, indeed, the power otherwise existed in 1867, as to which I shall have a word to say in a moment, of the work-people striking, which does not mean an individual ceasing to work at all, but means a combination, or, as our common law would have said, a conspiracy of persons to act together by way of a strike for the purpose of putting pressure on the employers, or *vice versa* action by the employers, not in relation to a workman, but in relation to the body of his work-people, in order that he may improve conditions from his point of view. Will your Lordships look at section 56: "It shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute



prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labour Act: Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike." Take the instance, first, therefore, of a man who is employed by a contract, under which he has to work down to a particular date, or until he has finished a particular job, and then there are no further contractual relations between the parties, there is nothing in this legislation to say to the employer: You must go on employing him. Take the case of a man who is entitled to say to his employer: You have employed me to do one thing and you were willing that I should do another, but I do not want to do the other; I have a better job; I will go elsewhere, or retire on my means; there is nothing to stop that.

VISCOUNT HALDANE: What about section 57?

Sir JOHN SIMON: "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours". It does not even cover other conditions; it is wages or hours. It is perfectly true that if the employer says to his men: Up to now you have been working so many hours a week; unless you are prepared to work more hours a week, I declare a lockout; it is perfectly true if the workmen say: At present you are only paying us wages at so much an hour, we require more wages an hour—

VISCOUNT HALDANE: It goes beyond a strike or a lockout.

Sir JOHN SIMON: Is that quite so? I confess I had thought that one had to read the two sections together, and the result of it was that the proviso in section 56 is really a finger post for the clause: "Nothing in this Act shall prohibit the suspension or discontinuance of any industry". Take, for instance, in the summer the demand for electric light in Toronto is not as high as in the winter, and they may reduce the number of people whom they employ.

VISCOUNT HALDANE: Are not the terms of the contract altered? Will you read the beginning of section 57?

Sir JOHN SIMON: "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours".

VISCOUNT HALDANE: That is general.

Sir JOHN SIMON: Yes, and I would agree, I am anxious not to put the matter a shade too high, that, supposing the employers were desirous of reducing hours or extending hours, or supposing that the work-people were desirous of a change in the other direction, that section 57 applies. We shall see in a moment the Common Law which Canada got by the transfer of 1867. It is very important to see whether it is a branch of criminal law, but my point is that this legislation is legislation which does not, as Mr. Justice Orde thought, interfere with the prevention of contracts of employment which have come to an end, or interfere with the termination of contracts.

LORD ATKINSON: It provides that a dispute is to be determined, and neither of the parties shall alter the conditions of employment with respect to wages or hours?

Sir JOHN SIMON: Yes, that is exactly what a strike or a lockout is for. The workman strikes because he wants to get more wages, and the employer locks out because he wants to pay lower wages.

LORD ATKINSON: That would extend to an alteration by consent?

Sir JOHN SIMON: It might, I agree; but your Lordships will appreciate my point. If you consider the life of the factory, there is nothing in this

legislation which prevents the employer saying to AB: You are not satisfying me, and if he, for genuine reasons, says: I terminate your employment, not because he is going to lower wages or increase hours, but because he does not want the man, and the man is equally free to do the opposite.

LORD DUNEDIN: There is this difficulty. I will assume for the moment that you have made good your point that Mr. Justice Orde has gone too far. There is still left undoubtedly, under the Act, certain provisions which prevent people doing what they otherwise might do, if it was not for the Act. In so far as they may deal with that it seems to me to be dealing with civil rights. For the moment I do not see what you gain by, to a certain extent, knocking the learned Judge on the head for what he has said.

Sir JOHN SIMON: I take no pleasure in that, especially when he is not here, but I think the point is important in this way, if I may put it to Lord Dunedin. My submission is going to be, among other things, and this is a view of the case which I rather think has not yet been developed by my friend Mr. Duncan, because we rather agreed that we should divide this into compartments, that the topic or head of Criminal Law comes in in this way. Let me assure your Lordships at once that I am not going to argue the proposition that if on other grounds this is *ultra vires* it becomes *intra vires* because penalties are enacted; that is a hopeless proposition, and I shall not argue it, but for a wholly different reason. It is a very remarkable fact that in the Canadian constitution, as framed in 1867, you find nothing at all about industrial conciliation or disputes. The reason, as I will show your Lordships in a moment, is this, and it is very interesting when we come to contrast it with the Australian constitution of 1906, that Canada took over the criminal law of this country as at a certain date, which I will call attention to, and that, if you once draw the distinction between the undoubted civil right of every Englishman to say to his employer: I give you notice that I wish to leave, and the right of every employer to say to the workman: I give you notice that you are to go, and contrast that with what is a wholly different thing, namely, the attempt of work-people to combine for the purpose of putting pressure upon their employers to improve the conditions as regards wages and hours, you find that you pass, your Lordships will forgive me for using the metaphor, into the realm of what was criminal law in this country, and it was not until the subsequent legislation, which my Lord Haldane knows so very well, because he served on the Commission on the subject, it was not until later statutes in this country that the workman's right to combine for the deliberate purpose of bringing pressure upon his employer by conspiracy, as it was called by the Common Law, to improve conditions and hours was recognized as lawful.

VISCOUNT HALDANE: That is true of the workman, but is it true of the employer?

Sir JOHN SIMON: That was one of the points brought before the Royal Commission. I know, because I have read the proceedings with great interest. Let us leave the employer's side out, and take the workman's side. Your Lordships will find, if you look at the Australian Constitution, which was drawn up in the year 1906, that this precise topic of legislation in regard to industrial disputes and conciliation is given in terms as a special head. If you had asked the fathers of Confederation, or, perhaps I had better say, skilled and competent lawyers, in 1867, the moment this statute had been passed: Can the Dominion Parliament codify and it may be to some extent alter and extend the law which prevents combinations for the purpose of altering conditions of wages and hours, I venture to think that the answer would have been: Certainly. It was in fact, in the view of most English lawyers of the time, already a branch of the common law, the criminal law of England. It has been made the subject of statutory enactment under the Combination Laws of 1900. It was, again, in a slightly



different form, made the subject of statutory provision in 1825. Chief Justice Erle, who himself, your Lordships will remember, was the Chairman of the earlier Commission, in *Hilton v. Eckersley*, in 7 Ellis and Blackburn, made use of an expression, in which he said that such a combination is a conspiracy under the Criminal Law, and, therefore, if the Parliament of Canada, after it had been constituted in 1867, had said: We do not care about the Common Law of England, let us codify it; and if they had written down: It shall be an offence punishable by fine and imprisonment for people to combine, not for the purpose of exercising their own individual civil right, but for the purpose, by combination and pressure, of bringing about an alteration of wages or hours; that would be a legitimate exercise of the powers of the Parliament of Canada to legislate in relation to a matter included in the class of Common Law. When you come to 1900, then, of course, as a result of English legislation, as my Lord knows so well, you have the change, so that to-day no doubt it is no part of the Criminal Law of England. Whether it could be made so in one of His Majesty's Dominions by a legitimate exercise of the power to make Criminal Law is a question which I need not trouble about. I am not in the least arguing that the thing comes within section 91, Criminal Law. The point is that the topic of combinations such as strikes, I will leave out lockouts for the moment, is a topic which, of its nature, at the time when the British North America Act was passed, might well be regarded as a topic of that character.

VISCOUNT HALDANE: Is it not primarily a civil topic?

Sir JOHN SIMON: I venture to submit there is a difference between a civil right and an individual which is unquestioned and unquestionable, and the public right, or the public wrong if you like, which it is the object of the Criminal Law to define and to restrain. May I give your Lordships one reference, and then I am going to submit that there are four or five pages in Sir FitzJames Stephens' history of the Criminal Law which really bring our minds to the kind of atmosphere at once. What was the law of Canada in 1867? The answer is this. The date, I think, of the passage of the British North America Act is 29th March, 1867. If you had occasion to enquire what was the body of Criminal Law which existed in Canada at that date, we have to apply a well known principle, but we also have to have regard to another thing. English Criminal Law was transported, perhaps I may say, by 40 George III, Chapter 1, Section 1, to Upper Canada, as it was then; it does not apply to Quebec. It was the English Criminal Law fixed as at the 17th September, 1792.

VISCOUNT HALDANE: That was the province of Canada?

Sir JOHN SIMON: Your Lordship will remember the story well. The Constitution Act of 1791 divided greater Canada into Upper and Lower Canada.

VISCOUNT HALDANE: It divided the province of Canada?

Sir JOHN SIMON: Yes, the Quebec element, the French element, has its own traditions and system of law; it is more favourable than the British Law on this subject; but we are not concerned with that, because this is Toronto. It we take what was called Upper Canada, the result of the Constitution Act, which is an Imperial Act of course, 31 George III, chapter 31, had created Upper Canada, which is now in substance Ontario; it had created a legislature for Upper Canada. The date on which that legislature began to function was, in fact, 17th September, 1792.

VISCOUNT HALDANE: It became a separate province?

Sir JOHN SIMON: Yes, and it had its separate legislature, and the theory was that the province had to be started off with a system of Criminal Law, and, therefore, the Criminal Law of Ontario is, in fact, the Criminal Law, so far as it is capable of being transplanted from the Mother Country as at 17th September, 1792, and if your Lordships care for the reference that is to be found in the Act of Upper Canada, 40 George III, chapter 1, section 1, which

fixes as at the 17th September, 1792, the Criminal Law in that area as being the English Criminal Law, subject to certain statutory alterations which the Ontario Legislature subsequently chooses to make. That being so, the question would come to be this. If we were to imagine ourselves a body of lawyers advising the Parliament of Canada in 1867 as to whether it could or could not put down in black and white divisions, such as my Lord Atkinson has referred to, codifying the law of conspiracy, so far as regards strikes and lockouts, the position undoubtedly would be that they could. They did not, in fact, do it, because they already had the English Common Law transferred, but the question was not whether they did, but whether they could do it.

VISCOUNT HALDANE: They could have altered the English Common Law?

Sir JOHN SIMON: Yes, or codified it.

VISCOUNT HALDANE: They could have acted under the Criminal Law head of section 91.

Sir JOHN SIMON: Undoubtedly, therefore, in 1868, taking the year in which the Dominion Parliament was called all together, they had said, as indeed the lawyers on the other side of the boundary said after the Declaration of Independence: We do not like this common law; let us write it down; let us make out our own law; if the Canadians had said: We will have our own law in black and white, undoubtedly the Dominion Parliament could have said: We will legislate that it is a criminal offence for workmen to combine for the purpose of improving their conditions as regards hours and wages. That is criminal conspiracy. What did this legislation do? It does not go nearly as far as that. All it does is this; it says: Call it what you will, conspiracy or no conspiracy, we at any rate will prevent you from carrying that conspiracy out until a certain event has happened; we insist that there shall be a pause, during which an inquiry may take place and a report may be made.

VISCOUNT HALDANE: Did not they therefore alter civil rights?

Sir JOHN SIMON: My argument is, if it is once agreed that they could have legislated for the whole thing, they plainly can do what is much more than the whole thing, say it is a statutory crime.

VISCOUNT HALDANE: They could alter the criminal law no doubt, or the statute of the United Kingdom, but had they power to make new laws regulating rights between employers and employees?

Sir JOHN SIMON: Is not there a great danger, if I may put it in that form, that we may possibly be rather begging the question. After all it must be agreed that the classes, or the matter which is in relation to the classes of the subject of civil right is not the same thing as the matter which is in relation to the subject of criminal law.

LORD DUNEDIN: When you enact a new criminal provision, do not you always interfere with the civil right?

Sir JOHN SIMON: Yes, you do. Let us suppose you pass a larceny Act. We passed one a few years ago which defined the law, and also had provisions which were new. If we provided that if anyone obtained money by menacing or blackmailing an individual, that is larceny that might be depriving such individuals of their civil rights.

VISCOUNT HALDANE: Supposing you said you are not to alter your contract without 30 days' notice; that is a civil change.

Sir JOHN SIMON: With great respect, does it quite say that? If you have a contract which extends over 30 days between A and B, there is no provision which would enable either party to break it.

VISCOUNT HALDANE: Supposing you have 3 days to go of this contract, under section 57 you have to give at least 30 days' notice of any change in the conditions as regards hours or wages, is not that an alteration?



LORD ATKINSON: If a man is hired on the terms of being able to terminate his employment at 6 days' notice, and you say he is to continue for 30 days, do you not interfere with his civil rights?

Sir JOHN SIMON: That is not what it says. The whole subject of sections 56 and 57 is this. It has never been the common law of England that I, as employer, and A.B., as workman, were not at law to give proper notice to one another and terminate our engagement, but it has been the common law of England that my work-people cannot combine together in order to give me contemporaneous notice for the purpose of putting pressure on me to improve the conditions.

VISCOUNT HALDANE: That is another thing.

Sir JOHN SIMON: That is the contract.

VISCOUNT HALDANE: It seems to me to be a very substantial alteration of the civil rights of employers and conversely of the employed to insist on his contract.

LORD DUNEDIN: Suppose we read the condition as a general condition; let me put this case. A workman is engaged to do 8 hours a day, and the condition of his employment is a weekly engagement, and there has to be on each side a week's notice. If I understand you aright, you said you must not give up the employment as a general proposition without 30 days' notice, and I say I am going to have a 9 hours' day for all of them.

Sir JOHN SIMON: Yes, my Lord, may I add: if you do not agree I will lock you all out.

LORD DUNEDIN: Supposing you say to a particular single workman, not to them all generally: I shall not take you, John Jones, back again unless you work 9 hours, could you do that without 30 days' notice to John Jones?

Sir JOHN SIMON: It would be a nice question whether this covers it or not; I confess I should rather have doubted it. It depends on one of those inferences which makes the perplexity of the law of conspiracy; it depends on a very metaphysical thing; it depends on whether, when these things are done, as Lord Justice Romer used to say, they are done with justification or excuse, or whether they are done for the purpose of exerting pressure, or in the exercise of a *bona fide* civil right, and those are very fine distinctions which I should be sorry to expound exhaustively to-day, but supposing you had a body of workmen, let us take a trade union, which says we are going to get our work-people better wages, we are not going to break his contract, we will give notice, and we will inform the employer that unless he agrees to improve the wages there will be a strike, my proposition would be that that was regarded by the common law of this country as illegal; certainly a great authority thought it so, and at any rate, it would be a *bona fide* exercise of the powers to legislate in respect of the matter of criminal law to declare in plain terms that it was illegal. Then the argument would be that, since the greater must include the less, it is not really legislation in relation to anybody's civil right, but is legislation in relation to a public right, or, if you like, a public wrong, which is involved if you restrict the exercise of the right to strike.

VISCOUNT HALDANE: In the particular circumstances. If a man has been employed for a weekly job, and they give him 10 days' notice, is there any provision which says you must not give him notice?

Sir JOHN SIMON: Undoubtedly there is no such provision, but would your Lordship for a moment hesitate before saying it is otherwise here?

VISCOUNT HALDANE: Looking at the construction of section 57?

Sir JOHN SIMON: I should suggest that section 56 and section 57 have to be read together.

VISCOUNT HALDANE: Is not section 57 an independent provision?

Sir JOHN SIMON: I doubt very much that that is the right construction.

LORD SALVESEN: It is all under the general heading.

Sir JOHN SIMON: Yes, it is all under the general heading "Strikes and lockouts prior to and pending a reference to a board illegal". Your Lordships will forgive me if I go back to section 56, but after all it is the first and presumably the main provision: "It shall be unlawful"—that is where criminal matter comes in—"for any employer"—not any employee—"to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labour Act; Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike".

VISCOUNT HALDANE: That is in respect to disputes between employers and employed prior to the reference?

Sir JOHN SIMON: Yes. I was going to say one more word about it.

LORD DUNEDIN: Before you go to that, may I tell you what I thought, namely, that section 57 is a mere appendage to section 56, section 56 being the penalty clause, and section 57 providing that they should have 30 days' notice.

Sir JOHN SIMON: In order to confirm your Lordship's view may I say that section 57 has been amended, and it is important to notice that. If you turn to page 30 you will see it confirms what Lord Dunedin says. It is plain that section 57 is a mere appendage to section 56, and this is merely saying that, if there is a change affecting conditions, there shall be an opportunity of inquiring into the matter before the flames burst out. At page 30, line 12, is section 5 of the later Act: "Section 57 of the said Act, as amended by section five of chapter 29 of the Statutes of 1910, is hereby further amended by substituting for the words in the first six lines thereof down to 'alter' inclusive the following." This is what we must do reading section 56 as the main condition which says that "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours".

VISCOUNT HALDANE: This only applies to industries to which the Act applies?

Sir JOHN SIMON: "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages and hours; and in the event of such intended change resulting in a dispute"—which it may very easily do—"until the dispute has been finally dealt with by a board, and a copy of its report has been delivered through the registrar to both the parties affected, neither of those parties shall alter", the conditions of employment with respect to wages and hours.

VISCOUNT HALDANE: Supposing the workman says to his employer: I have been working for eight and a half hours, I am only going to work for eight hours, has he not to give 30 days' notice, or, if there is a dispute going on, until the end of the dispute?

Sir JOHN SIMON: What is contemplated is a state of things in which you can ask: How many hours do people work in a certain industry, and then supposing the workmen were to say, that is too long——

VISCOUNT HALDANE: Or a workman?

Sir JOHN SIMON: I am not sure that one workman could do it.

VISCOUNT HALDANE: I am looking for the element of conspiracy.

Sir JOHN SIMON: There have to be 10 workers affected.



VISCOUNT HALDANE: I am not quite sure about that. For some purposes 10 have to be affected, but it does not say for all purposes.

LORD DUNEDIN: What makes me rather think that a single workman could not do it is the other words. I do not think one man can strike, and if you send away one man because you do not like him it is not a lockout.

Sir JOHN SIMON: No.

LORD ATKINSON: If 10 men strike each man is concerned with that strike.

Sir JOHN SIMON: Yes, and that is really at the heart of a good deal of this question about it being a conspiracy as to whether particular cases are within the criminal law of conspiracy or not. No doubt your Lordships will recall that, whereas Chief Justice Erle and some other very distinguished judges in the last century thought it was, a most distinguished judge of the High Court, Mr. Justice Wright, in his book tried to show that it was not. It does not matter to me. The question as to a particular right in relation to criminal law cannot depend upon whether Chief Justice Erle or Mr. Justice Wright understood the criminal law best. The question is whether it is a topic of that character, and if so it is quite enough criminal law for me. I do not know whether your Lordships would think it convenient if I reminded you of a passage in the 3rd volume of Sir James FitzJames Stephens criminal law. He begins at page 203. I think the four or five pages which follow give one in the most admirable compendious form what is necessary to be reminded of on this subject. It is Sir James FitzJames Stephen's history of the Criminal Law of England, Vol 3. It was written in 1883. The page is 203. This is a work of great interest and authority, and, if I can summarize it, it will save your Lordships' time. What the learned author points out is this. He points out that really this view about there being something in the nature of a criminal conspiracy if you have a combination for the purpose of raising wages, really goes back to the time of the statute of labourers. The truth is after the Black Death, when the statute of labourers was passed, there developed in this country a view that really it was the business of Parliament and the State to fix people's wages and so forth, and that therefore, while individuals no doubt had the right to give notice, or might in some cases have a right, it was also disputed that they had any business to combine for the purpose of forcing up things. In the 18th century that was very greatly supported by another view, the view of the economists who took the view that wages will always find their own level by the action of economic forces, and really to try and combine for the purpose of altering rates and wages was almost as vile a crime as if you tried to improve the pressure of the atmosphere by tampering with the barometer. Their theory was that wages were what they were as the result of the economic forces, and Sir James FitzJames Stephen points out that under those two influences, one the historic influence and the other economic influence, there was a body of doctrine in this country at that time, and that all this kind of matter was criminal, and he gives the essential references. After referring to that early period, he then points out that later on the Chairman of the Trades Unions Commission reported in 1869 wrote a very elaborate memorandum. 1869 is two years after the British North America Act. He refers to the history of the combination laws. The essential facts are that there was a statute passed in 1800, a time of very great domestic disturbance, and there was an attempt by Mr. Joseph Hume to repeal the combination laws. At first they were repealed in rather a wholesale fashion, but subsequently they were watered down to much what they were before. Then right down to 1871 a workman if he combined with his fellows was in a considerable state of danger, because he was always liable to be indicted, not because he was not entitled individually to give notice, but because if it should be shown that he really was combining for the purpose of bringing pressure upon his employers to settle an industrial dispute with him to his own advantage, that was or might come within the criminal legis-

lation. Sir FitzJames Stephen says: "The most important of these is the dictum of Mr. Justice Grose in *Rex v. Mabey*: 'In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he can, but if several meet for the same purpose it is illegal and the parties may be indicted for conspiracy'". Then he points out that in the well known case of *Hilton v. Eckersley*, in 5 Ellis and Blackburn, the case about the employers in Lancashire who agreed together that none of them would ever pay more wages to any one of their work-people and would fix the wages by consultation together and would give their bond so to do. Eckersley gave the bond, and he was sued on it, because he gave more wages to his work-people, and got all the work-people, and it was held that they could not recover on it. There you get something that the courts would not assist, because it is criminal in its nature.

VISCOUNT HALDANE: The idea of that is restraint of trade; it is all the outcome of the old fashioned doctrine as to restraint of trade.

Sir JOHN SIMON: Yes.

LORD DUNEDIN: What Commission did you refer to on which Lord Haldane sat. I think you must be thinking of myself. I was Chairman of the Trade Disputes Commission.

Sir JOHN SIMON: I think that must be it, my Lord. I do not know to whom I should apologize, but I sympathize with both of your Lordships. I submit that shows how plainly this would have been the 70's of the last century as being in relation to Criminal Law. Would your Lordships be good enough to look at 5 George IV, chapter 95, which was the law which replaced the Combination Act of 1800. It only stood on the Statute Book for twelve months. This Act was the work of Mr. Joseph Hume and the Radicals. It was repealed in the next year, and the exact result has, of course, always been a matter of very serious dispute. Mr. Justice Wright exerted his very ingenious and powerful mind in the direction which one would rather expect; he took a very sympathetic view of this before ever the Trade Unions Acts of 1871 and 1875 were passed, that, as a matter of fact, it was a historical mistake to suppose that workmen could not combine in the way suggested. Other people took a different view. The recital of this Act of 1824 is contemporaneous of the fact that in the first quarter of the last century this topic was a topic of Criminal Law. May I read the recital: "Whereas it is expedient that the Laws relative to the Combination of Workmen, and to fixing the Wages of Labour should be repealed; that certain Combinations of Masters and Workmen should be exempted from Punishment; and that the Attempt to deter Workmen from Work should be punished in a summary Manner." That is what is called peaceful persuasion. "Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same"—I ask your Lordships to look at this list of statutes which they were engaged in repealing, Scottish as well as English—"That from and after the passing of this Act, so much of a certain Act passed in the Thirty third Year of King Edward the First intituled Who be Conspirators and who be Champertors, as relates to Combinations or Conspiracies of Workmen or other Persons to obtain an Advance or to fix the Rate of Wages, or to lessen or alter the Hours or Duration of the Time of working, or to decrease the Quantity of Work, or to regulate or control the Mode of carrying on any Manufacture, Trade or Business, or the Management thereof, and as relates to Combinations or Conspiracies of Masters, Manufacturers or other Persons, to lower or fix the Rate of Wages, or to increase or alter the Hours or Duration of the Time of working, or to increase



the Quantity of Work, or to regulate or control the Mode of carrying on any Manufacture, Trade or Business." Then they proceed to recite a whole sheaf of statutes, both Scottish and English. Then there is also an Irish one; then they come to the Caroline Statutes and the Georgian Statutes. The truth is that the historical and Criminal Law of this country includes as part of its proper subject matter that topic in relation to which the Parliament of this country in the past has often legislated, namely, the action, whether by lockout or strike, with a view of determining a trade dispute in favour of one side or the other.

VISCOUNT HALDANE: Where are these words you are referring to now?

Sir JOHN SIMON: Having recited all those it goes on, just before the end of the first section to repeal all those, together with all other laws, statutes and enactments now in force "enforcing or extending the Application of any of the Acts or Enactments repealed by this Act, shall be and the same are hereby repealed."

VISCOUNT HALDANE: There were two objections to an agreement among a body of workmen to stand together for increased wages, and shorter hours. The first was that it was in restraint of trade, and that made it indictable. The second was that it was a conspiracy. Does this first section deal with both those objections, the civil objection and the criminal objection?

Sir JOHN SIMON: No, I think it was addressed to the criminal objection. That is my impression.

VISCOUNT HALDANE: That still remains?

Sir JOHN SIMON: Yes, but what is interesting is that, this having been passed in 1824, Parliament within twelve months repealed this Act and restored a very large part of the old laws. The Criminal Law of Canada, in fact, is as at a date at the end of the eighteenth century, and in this case I am not concerned to go into very closely exactly what was the criminal law of this place or that. All I need do is to say that that topic, the thing which the statute is dealing with, is a topic that is in relation to criminal law.

VISCOUNT HALDANE: You cannot touch this case without its being in relation to criminal law.

Sir JOHN SIMON: Then we come to a thing that is very familiar to all your Lordships when you have to ask yourselves: Is not that the real matter in relation to which this legislation is passed?

VISCOUNT HALDANE: There is one thing which troubles me, and that is that head 15 of section 92 enables the province to pass criminal laws for the purpose of enforcing civil obligations.

Sir JOHN SIMON: That is true.

VISCOUNT HALDANE: And all this might be read as legislation under that if you start by altering the civil rights in a province?

Sir JOHN SIMON: Perhaps I might ask your Lordships' attention to two more passages in this statute while it is before you. Having in the first section recited this immense bundle of statutes, they go right back and repeal them. Then in section 2 it is said: "And be it further enacted, That Journeymen, Workmen or other Persons who shall enter into any Combination to obtain an Advance, or to fix the Rate of Wages, or to lessen or alter the Hours or Duration of the time or working, or to decrease the Quantity of Work, or to induce another to depart from his Service before the End of the Time or Term for which he is hired, or to quit or return his Work before the same shall be finished, or not being hired, to refuse to enter into Work or Employment, or to regulate the Mode of carrying on any Manufacture, Trade or Business, or the

Management thereof, shall not therefore be subject or liable to any Indictment or Prosecution for Conspiracy, or to any other Criminal Information or Punishment whatever, under the Common or the Statute Law."

VISCOUNT HALDANE: That is pure Criminal Law?

Sir JOHN SIMON: Yes, and your Lordships see section 2 is as to workmen. Then section 3 is an exactly corresponding provision about employers: "And be it further enacted, That Masters, Employers or other Persons, who shall enter into any Combination to lower or to fix the Rate of Wages, or to increase or alter the Hours or Duration of the Time or working, or to increased the Quantity of Work, or to regulate the Mode of carrying on any Manufacture, Trade or Business, or the Management thereof, shall not therefore be subject or liable to any Indictment or Prosecution, or for Conspiracy, or to any other Criminal Information or Punishment whatever, under the Common or the Statute Law."

VISCOUNT HALDANE: That is criminal too?

Sir JOHN SIMON: Yes, it is Criminal Law, there is no doubt.

VISCOUNT HALDANE: Section 4 is a little more. Will you look at the end of section 4?

Sir JOHN SIMON: Is it not about penal provisions?

VISCOUNT HALDANE: It goes further.

Sir JOHN SIMON: "That all penal Proceedings for any Act or Omission against any Enactment hereby repealed, and not made punishable by the Provisions of this Act or for any Act or Omission hereby exempted from Punishment, shall become null and void; and that no penal Proceedings for any Act or Omission against any Enactment hereby repealed, and not made punishable by the Provisions of this Act, or for any Act or Omission hereby exempted from Punishment, shall be instituted against any one in relation to any such Offence already incurred."

VISCOUNT HALDANE: Look at the proviso.

Sir JOHN SIMON: "Provided that no Person shall be subjected to loss or Liability for any Thing already done, touching any Act or Omission, the Penal Proceedings against which are hereby made null and void, or shall lose any Privilege or Protection to which the Enactments hereby repealed entitle him."

VISCOUNT HALDANE: That touches civil rights.

Sir JOHN SIMON: I think all it meant was that if you had already as a common informer recovered a particular penalty you shall not be made to pay it back.

VISCOUNT HALDANE: It says: "No person shall be subjected to Loss or Liability for any Thing already done, touching any Act or Omission, the penal Proceedings against which are hereby made null and void". Does that mean that anybody who has got the benefit can also say: I am to be made civilly liable?

Sir JOHN SIMON: I had thought it was securing that vested rights were not interfered with.

VISCOUNT HALDANE: He is not to be made civilly liable for anything apparently.

Sir JOHN SIMON: It is in respect of what has already happened. I want to put, now it is fresh before your Lordships' minds, what is the application of this. This is 1824. Every one of these statutes hereby recited I submit was the criminal law of Canada, and this Act of 1824 did not stop them being the Criminal Law of Canada, because this only applied to the United Kingdom, and they are the Criminal Law of Canada today, save in so far as the Criminal Code of Canada may have altered them. If that is the case, how can it be other than legislation by the Dominion Parliament in relation to Criminal Law, if it says: If you are



contemplating a strike, or if you are contemplating a lockout, or a forcible way of settling an industrial dispute, we legislate that until there has been this investigation you shall not strike or you shall not lock out. Why is not that in relation to Criminal Law?

VISCOUNT HALDANE: If that were all there would be a great deal in what you say, and probably there would be none of us here, but it is far more than that. I am referring to sections 56 and 57.

Sir JOHN SIMON: Your Lordships have them.

VISCOUNT HALDANE: Must not you say, in order to succeed, that these relate to Criminal Law?

Sir JOHN SIMON: I do not think the test is exclusively.

VISCOUNT HALDANE: The pith and substance?

Sir JOHN SIMON: If you please, whatever the phrase may be. You must look at the substance of the thing, and consider, when you look at the thing, in substance, though no doubt it may indirectly and incidentally affect something else, after all when you look at the thing in substance is not the pith and substance so and so?

LORD DUNEDIN: Must not the test be this? As I have already said you cannot in any way make a criminal provision that does not interfere with a civil right. If you are not allowed to do a thing which before you had the right to do, that certainly is interfering with a civil right.

Sir JOHN SIMON: Yes.

LORD DUNEDIN: Therefore, in so far as the effect of what I assume to begin with is criminal legislation touches civil rights, that will not matter if the other provisions are truly ancillary to what I may call the criminal part of it; but, if the other provisions are something substantially by themselves and not in any way ancillary to what has been done before, then the difficulty suggested by Lord Haldane would arise. Does it not do more, and, therefore, I think, your next point is to show us if anything which looks civil upon the face of it in these provisions is nothing more nor less than a sweeping ancillary provision to the part of the statute which is dealing with criminal law.

Sir JOHN SIMON: Yes.

VISCOUNT HALDANE: You would have to say that, because if it is true that this is a substantive provision, then the criminal provisions do not require section 91 to bring them into existence; they can be brought into existence under head 15 of section 92.

Sir JOHN SIMON: I should like to look at that as your Lordship is good enough to mention it.

VISCOUNT HALDANE: Just look at head 15: "The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section", that is section 92. Is not that Criminal Law?

Sir JOHN SIMON: I am afraid I do not quite follow your Lordship.

VISCOUNT HALDANE: The question is whether the substance of this statute could have been enacted by the province. If it could, it falls within section 92, and then it falls exclusively within section 92, and not within the enumerated heads of section 91. Do not those two sections cover the whole thing?

Sir JOHN SIMON: I speak with the greatest submission to your Lordship, because we all know your Lordship is a master of the subject. With great respect, is that against us? Your Lordships see section 91, under which: "Any matter coming within any of the classes of subjects enumerated in this section"—Criminal Law is one of the specific subjects in section 91—"shall not be

deemed to come within the class of Matters of a local or private nature comprised in the Enumeration of the classes of Subjects by this Act assigned exclusively to the Legislatures of the provinces."

VISCOUNT HALDANE: That is true; that refers to all the heads in section 92.

Sir JOHN SIMON: Yes. I am not asking for the moment if your Lordships think my argument is right; I only want you to see that it is logical. My argument is that this topic on this view will be found to be a topic in relation to a specific head of section 91. I may be wrong about that.

VISCOUNT HALDANE: If that is really the test, is it a matter of section 91 at all?

Sir JOHN SIMON: May I pursue what I am submitting as a little scheme of argument. I agree it is a question of whether I am right.

VISCOUNT HALDANE: I think you can accept my test.

Sir JOHN SIMON: Yes, I do entirely.

VISCOUNT HALDANE: It is something rather different.

Sir JOHN SIMON: Yes, and it is a formidable point. I want to make it plain. It is a question of the pith and substance; if it has relation to head 27 of section 91 then it is no good saying: Ah, but then might not it be that this is a topic which, under the head of property and civil rights, could be dealt with under section 92, and then could not the provincial legislature supplement and validate what it was doing by saying: If you do not do what we say we will punish you?

VISCOUNT HALDANE: If it was civil rights merely as incidental to criminal law under head 27 of section 91 that would be all very well, but supposing it is the other way on. Supposing it is civil rights primarily and criminal law only assisting civil rights, do you require head 27 at all? Have you not under head 15 of section 92 all you need in order to cover the field of this statute for the province?

Sir JOHN SIMON: May I deal with that? I have another argument. I am anxious to make the board see that when we talk about criminal law it is not criminal simply because we have imposed a penalty. It is more substantial than that. I am on the point that the subject matter of this legislation, so far as it is objectionable at all, is really what the Dominion Parliament of Canada would regard as criminal law.

There is one other reference I will give your Lordships before I deal with Lord Dunedin's point. I mention the famous declaration of Chief Justice, then Mr. Justice, Erle in the case of *The King v. Rowlands*. That was a case which was tried at Stafford, and it became really the *locus classicus* with regard to the judicial view about this. Chief Justice Erle's summing-up in this case is extremely well known and often referred to. He told the Jury this, and this was taken to be good law: "A combination for the purpose of injuring another is a combination of a different nature", etc. (Reads from the summing-up.) It does not appear to me that it is material for me to argue, and I should have doubted whether it was necessary for your Lordships to decide exactly at what point, according to the Common Law of England, you are face to face with a criminal Act. It is enough for me to say that the fact that there is this vast mass of statute law and Common Law and authority shows quite clearly that if the Parliament of Canada in 1868, as in subsequent years, instead of contenting themselves with saying that you shall not settle an industrial dispute, except by strikes or lockouts, for thirty days, had said: You shall not settle it by strikes or lockouts at all, they would have unquestionably been dealing with a matter which was in relation to criminal law. What they have said is something which is tepid compared with that. They have said: We are not going to



make so severe a law as that, but we are going to make it criminal for either employers or work-people, if an industrial dispute arises between them, to lock out or strike until a particular condition is fulfilled; and my respectful submission is that on the right view of this legislation it is still a Dominion topic within section 91.

LORD DUNEDIN: The greater includes the less, and the less does not thereby become something different?

Sir JOHN SIMON: Yes, my Lord, that is my whole point.

VISCOUNT HALDANE: Supposing that the provinces were to pass a law saying nobody is to be in a public house after eight o'clock, and he is to be liable to a fine of a dollar if he is found there; that would be criminal law. Do you say that is within the competence of the Dominion?

Sir JOHN SIMON: I am not sure whether we are not approaching the famous reflection about the unoccupied field.

VISCOUNT HALDANE: I want to get a little away from the unoccupied field. Here is section 92, which says that municipal institutions are exclusively in the hands of the province. There is head 15, which says that the imposition of punishment by fine, or penalty, for enforcing any law of the province, in relation to those things, is given to the province.

Why is not that given exclusively to the province? Can you read the words "any matter", at the end of section 91, as including that? Otherwise it might repeal everything which section 91 touched. It has never been said that the words at the end of section 91 are anything but words of construction. I am not sure under which specified head of section 92 the penalty would come.

VISCOUNT HALDANE: Primarily civil rights, but it might be under 8, Municipal Institutions. This is a Municipal Institution.

Sir JOHN SIMON: Your Lordship was referring to the case of a public house.

VISCOUNT HALDANE: Yes, I thought you had gone back. Let us assume that a regulation has been made by the municipality of Toronto that nobody is to stay in a public house after 8 o'clock at night, and there is a fine of a dollar if he does.

Sir JOHN SIMON: I suppose the power of a municipality to make by-laws for securing peace, order and decency in a town is unquestionably a provincial matter.

VISCOUNT HALDANE: And it imposes a penalty.

Sir JOHN SIMON: I do not see myself the difference between saying that a man shall not be in a public house after 8 o'clock, and saying that a man shall not eat chocolates in a theatre.

LORD ATKINSON: Does it not make a difference if it says he shall be sent to prison?

Sir JOHN SIMON: Whether we are dealing with a piece of provincial legislation or a piece of Dominion legislation, merely saying that you shall not do a certain thing, and if you do you shall pay so much, that is purely ancillary to the purpose, presumably the lawful *intra vires* purpose.

LORD DUNEDIN: Section 15 is really correlative to the other thing. You shall not make legislation which is truly civil criminal by adding a penalty. On the other hand true civil legislation shall not lose its character.

Sir JOHN SIMON: I should not suggest for a moment, supposing you had an unquestioned case of legislation which fell within civil rights, I should not seek to argue that merely because there was appended to that a penalty it was a criminal matter. Supposing it was a provision that no man shall practise in this province as an auctioneer unless he has a license from the Town Hall, and, if he does practise as an auctioneer without getting a license, he shall be fined 20

dollars, I comprehend beyond all question that the provision that he is to get a license from the Town Hall is no doubt legislation which affects his civil rights, but the appendage that, if he does not do what he is told to do in exercising his civil rights, he shall pay a fine, is a mere appendage.

VISCOUNT HALDANE: Do you say that under section 91 the Parliament of Canada could make it a serious offence if he violates the terms of his license, although it is a Dominion law?

Sir JOHN SIMON: I do not know how that might be; there is a good deal of authority about it.

VISCOUNT HALDANE: I do not know of the Dominion ever legislating criminally to enforce the statutory provisions of section 91. I am suggesting to you that under head 15 the province has power to pass criminal laws which it could pass if it was enacting this statute, and then if so the whole matter is within the competence of the province.

Sir JOHN SIMON: I do not think that my Lord for the moment appreciates the bold position that I take up. He is being too good to me. My Lord is being so good as to suggest that I am saying this is a matter of civil rights under section 92, but I save myself by saying that the provision about punishment and convictions would come under section 91. That is not my point; I go much further. I say the topic that is being dealt with here is criminal law, and the circumstance that you say, not that a man shall never settle an industrial dispute except by a lockout or a strike, but that before he claims to do something else must happen, does not in the least prevent it being criminal. That was the point Lord Dunedin put to me. I go the whole way.

VISCOUNT HALDANE: The statute goes further. The statute is saying you are not to do something which it appears to assume you might do; you might give these notices and declare a strike or a lockout. It says you are not to do that. It is not a statute enacting the law of conspiracy; it is a statute to put in a further restriction.

Sir JOHN SIMON: Let me put it in a slightly different way. I am only putting the argument as best I can; it is for your Lordships to judge. Supposing that after 1867 you had in succession two separate enactments of the Dominion Parliament, and supposing that the first of those enactments said: it shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike in the case of an industrial dispute, and it stopped there, then supposing that there was a second and subsequent enactment of the same Dominion Parliament which said: "With reference to the law we have already passed it is unlawful"—which means criminal—"for any employer to declare or cause a strike, and we amend that by saying that they may do so as soon as a particular inquiry has been held". If that is the position why is not the whole of that criminal law?

VISCOUNT HALDANE: That is one way of putting it.

Sir JOHN SIMON: That is the way I am putting it.

VISCOUNT HALDANE: The other is to say it is unlawful to do this unless there has been a reference to a board?

Sir JOHN SIMON: I have read the words of the statute, but I have put them in two Acts of Parliament instead of one.

VISCOUNT HALDANE: I am looking at the statute itself. Will you look at page 56, "It shall be unlawful" and so on. Is not that making something unlawful which is treated *prima facie* by the statute as being lawful?

Sir JOHN SIMON: The whole point of what I have been saying this morning is to show that the subject matter of criminal law in Canada was this in 1867. We have to transport ourselves back to that date.



VISCOUNT HALDANE: All I mean is that the draughtsman of the Dominion Parliament Act does not seem to have appreciated that.

Sir JOHN SIMON: Possibly there might be some people in England who do not appreciate that if we had been legislating in 1867 it would have been necessary to have enacted for the first time that strikes and lockouts were unlawful, because Chief Justice Erle and Sir James FitzJames Stephen thought it was already criminal.

VISCOUNT HALDANE: I think it would mean that public opinion had got so strong that the law was treated as obsolete that you might not combine to raise wages, and the Conservative Government of that day passed legislation.

Sir JOHN SIMON: That is perfectly true.

VISCOUNT HALDANE: Supposing they passed a statute saying that strikes and lockouts were illegal, would that be within their powers?

Sir JOHN SIMON: Yes, I submit so. All criminal law which prohibits human action and punishes it is to that extent a thing which is called interference with civil rights, but the test is not whether it interferes with civil rights, the test is a different test: What is the subject matter in relation to which the law is really passed. To give an illustration that is familiar as long ago as *Russell v. The Queen*, your Lordships will remember it was pointed out that universal prohibition for Canada may interfere with the sale of liquor under license, and the granting of liquor licenses for the raising of tariff revenue is a Provincial matter, but I say that the province probably may interfere with the sale of liquor included in the license, but not in relation to the licenses.

I am not quoting a passage that has been criticized, it is an illustration given. It is on page 838. My Lords say: "Suppose it were deemed to be necessary or expedient for the national safety, or for political reasons, to prohibit the sale of arms, or the carrying of arms, it could not be contended that a Provincial Legislature would have authority by virtue of subsection 9 (which alone is now under discussion) to pass any such law, nor, if the appellant's argument were to prevail, would the Dominion Parliament be competent to pass it, since such a law would interfere prejudicially with the revenue derived from licenses granted under the authority of the Provincial Legislature for the sale or the carrying of arms. Their Lordships think that the right construction of the enactments does not lead to any such inconvenient consequence". Then comes this critical sentence: "It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under subsection 9, is not in itself legislation upon or within the subject of that subsection, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion".

VISCOUNT HALDANE: That is a critical sentence which raises the principle.

Sir JOHN SIMON: Yes. I am thoroughly bearing in mind what we know now, that there are passages in *Russell v. The Queen*, perhaps even the actual application of it, which have been sometimes thought to be very doubtful. As my Lord Haldane says, the test on the construction of the statute is very properly put there, the real test is: What is the subject in relation to which this law is passed, and the circumstance that having passed it you interfere with this, that or the other is in certain aspects very relevant; it is one of the misfortunes of legislation that you have reaction other than what is expected. It is interesting to observe this—my learned friend has been good enough to give me some of his thunder—one of the points which my Lord Haldane has been suggesting for the purpose of test is exactly the point argued by Mr. Benjamin in *Russell v. The Queen* unsuccessfully. I might call the attention of the other members of the Board to this. The point Lord Haldane raised by way of discussion just now, not at all adopting it, about Provincial criminal law, is exactly the argument which

was unsuccessfully advanced by Mr. Benjamin in *Russell v. The Queen*. Let me read on page 840 of 7 Appeal Cases: "It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to subsection 15 of section 92, viz., 'The imposition of any punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section'. No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects; but as far as they have yet gone, their Lordships fail to see that this has been done".

VISCOUNT HALDANE: I am with you on that.

Sir JOHN SIMON: I know your Lordship is.

VISCOUNT HALDANE: The question is really: Is this provincial or dominion?

Sir JOHN SIMON: That is the whole point. Your Lordships on this point are not likely to disagree as to what the test is. Of course I am only an advocate here.

VISCOUNT HALDANE: I only refer to subsection 15 of section 92 as showing that legislation by the province on that subject would not necessarily be incomplete for want of criminality.

Sir JOHN SIMON: I take up the position before we come to the general subject-matter or residuum business in section 91. My submission is, you take section 91 and go through its specific heads; then you take section 92 and go through its specific heads. You observe what in fact was the criminal law and the field of criminal law which Canada adopted by transfer when the Dominion was created; it is unquestionably a body which includes, as Lord Wrenbury said just now, the power to prohibit that form of action, dangerous it may be to the community, which is endeavouring to settle industrial disputes by force whether it is by strike or lockout. It is one of the most interesting things in the history of industrial settlements, and most interesting when one recalls that Mr. Mackenzie King was then an official in the Ministry of Labour and had, in an official character as a Departmental investigator, something to do with it, and one understands his interest in it to-day. It was a very remarkable idea seeing that modern conditions will not stand the perpetuation of the severe Criminal Code which some people held in the eighteenth century; with our modern community we cannot do it, but what we do is this: The attempt to settle industrial disputes by this form of combination in England is in the last degree injurious to the public weal, let us begin by saying it shall be unlawful for any employer to declare a lockout or for any employee to go on strike, but do not let us say that that is for ever, let us say that it is to be so until this inquiry has been held, and this Board has reported. When we come to the inquiry, a thing which Lord Dunedin put at the outset of the case which has to be considered, where do we stand? I do not understand it to be suggested that it is *ultra vires* the Dominion Parliament to say they will have an inquiry; it is not *ultra vires* that itself is not *ultra vires* in any view. The inquiry is merely the condition which has to be fulfilled before it becomes lawful to strike. As a matter of fact our own body of Criminal law at this moment contains things not altogether unlike it. As your Lordship knows there are certain public services, gas-works are one, where as a matter of fact provisions are made to secure that there should not be a sudden cutting off of the gas, without a crime being committed.

LORD ATKINSON: Lightning strikes?

Sir JOHN SIMON: Yes. To summarize this case, I could put it in three propositions by saying that a law in Canada which prohibited lockouts or strikes as a means of settling industrial disputes must be in relation to criminal law, a lightning strike or a lightning lockout is a kind of strike or a kind of lockout of that sort, and the conclusion of the syllogism is this law which says,



though you may legitimately strike or lock out, saving a lightning strike or a lightning lockout, the truth must be known first, and, therefore, within the topic.

LORD ATKINSON: I cannot help thinking, if a man has a certain legal right to do a certain thing and you pass an Act to say that under certain circumstances it shall be a crime to do that thing, you interfere with his civil rights, and make it a crime for him to exercise them in a particular way.

SIR JOHN SIMON: That is true, and I would agree to it; I think it is true that you interfere, but none the less the circumstance that you make even a new criminal law will not prevent your regulation being in relation to a criminal matter.

LORD ATKINSON: I think it is both; it is in relation to exercising his right in a way that is criminal.

SIR JOHN SIMON: Lord Atkinson follows this: The position is taken up that it is in relation to both, I mention the language at the end of section 91, that if it is once established that the legislation is in relation to enumerated topics in section 91 it is none the less within section 91 even though it is also within an enumerated topic in section 92.

VISCOUNT HALDANE: That surely cannot be quite right; there are many things within section 92 which touch heads of section 91 and on which yet section 92 prevails.

SIR JOHN SIMON: I am using very careful language, I am saying "in relation to" on both occasions. Would Lord Atkinson at any rate follow my reference?

VISCOUNT HALDANE: To clear it up, surely these words at the conclusion of section 91, which were commented on very carefully in the case in 1896, simply mean that the whole of the subjects in section 92 are included as local matters and heads in section 91 are not to be construed as affecting them.

SIR JOHN SIMON: I am not discussing some vague and impossible hinterland.

VISCOUNT HALDANE: I am alarmed at that.

SIR JOHN SIMON: I am keeping very close to the coast.

VISCOUNT HALDANE: But a claim to the hinterland often gives rise to warfare though you are not going there.

SIR JOHN SIMON: Will Lord Atkinson look kindly at the Joint Appendix Statutes on page 2; my Lords know it well. I am afraid it is probably inscribed on your heart.

LORD ATKINSON: We shall never forget it.

SIR JOHN SIMON: "Any matter coming within any of the classes of subjects enumerated in this section." I am going to substitute: "Any matter which is really in relation to the criminal law."

VISCOUNT HALDANE: It is a very material substitution. What does it come within?

SIR JOHN SIMON: I am not making any assertion about this law, I am merely putting an argument.

VISCOUNT HALDANE: I quite follow it, but it is not the equivalent of the words.

SIR JOHN SIMON: If my Lord will forgive me, I am dealing with the observation of Lord Atkinson, who said his present impression was these particular things came within both.

LORD ATKINSON: Every man has a right to fish in his own fresh water, but he must not use a particular instrument; the enactment is passed to make that a crime if he does that.

SIR JOHN SIMON: Your Lordship has my point. I want to say a word about the *Board of Commerce* case, which is quite fresh in my memory. I had the honour to argue that case, and I found myself on the side which prevailed. I recognize that the *Board of Commerce* case is a case which goes as far against me as any case at present reported. The distinction, if I may say so, is a very plain one. The *Board of Commerce* case is in 1922, 1, Appeal Cases.

LORD ATKINSON: It is difficult to reconcile that with *Russell v. The Queen*.

VISCOUNT HALDANE: If you had not *Russell v. The Queen* you would be in a great difficulty notwithstanding your ingenious argument of to-day. *Russell v. The Queen* is really your sheet anchor.

SIR JOHN SIMON: I am not throwing it over. I rather thought it must be considered in relation to this, and I want to submit a short argument about the *Board of Commerce* case. There, the first object was to prevent people who were in possession of goods, who owned goods, from exercising one of the ordinary civil rights of everybody who owns a piece of movable property, namely, of selling it.

LORD ATKINSON: At any price he could get.

SIR JOHN SIMON: That is what it was, it was an unjustifiable interference, if I may use that rather dangerous substantive, with contracts, it was the first purpose of the statute to legislate in relation to private rights, and therefore there is a very broad distinction between that class of case and what we appear to be dealing with here. I perfectly understand your Lordship's anxiety lest the present statute we are now discussing should be found materially to touch or trench, as it is said, upon "property and civil rights." The right answer, as I venture to submit, is that after all that is or may be a consequence, but the whole point is, not what is the consequence, but what is it at which the statute is aiming, and if you have in the present instance a statute which is aiming at the establishment and preservation of public order, or at the prevention of a particularly dangerous kind of disturbance, at restricting at any rate the exercise of combination in order to settle industrial disputes by force, it is nothing to the point to say, yes, but, if you do those things, incidentally you will touch the civil rights of A or B, whereas in the *Board of Commerce* case that was the very thing which the Act was aiming at. I can imagine my friends talking about forestalling and regrating and all those old things. Your Lordships observe the *Board of Commerce* case went far beyond that, the law of forestalling and regrating was obsolete. The object was, even if you had got the goods in your shop, although you made no special arrangements to corner the market, you could not sell them except on particular terms.

LORD ATKINSON: That is a very old proposition; although a man might have money in his chest he might not lend it at interest beyond a certain sum; he was allowed to get interest but not at a higher rate of interest than was indicated.

SIR JOHN SIMON: It would be an amazing thing to fit the book of Mosaic Codes into section 91 and section 92.

VISCOUNT HALDANE: I have already pointed out the form of the Act in question in this case; it appears to recognize the right to enter into combination and to do certain things, and then to prohibit it if there is an inquiry ordered. It may be due to a vague state of mind on the part of the draftsman, or it may be he thought these Acts were all out of date in 1867.

SIR JOHN SIMON: There was a good deal that happened even as late as that in this country, and you get Mr. Justice Stephen writing much later than that. Then your Lordships observe about the *Board of Commerce* case, in that case your Lordships' judgment conceded some portions of what I have here. I will call attention to a passage on the last page of the judgment where,



after emphasizing the fact that this really was entrenching upon the provincial power, your Lordship goes on to say: "It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole." Let me build up a little. Let us suppose that it is a permissible action for the Dominion to take. Let us suppose that by publishing such information they really got public opinion to work. Suppose they said: We are going to have provided a precise inquiry in this country. Nobody questions that is within the competency of the Dominion. Now I get back to my original argument: If therefore I am at liberty to treat what is the matter in dispute—this is putting an argument of criminal law in the full sense of the Dominion—the circumstance that it also provides, as Lord Dunedin pointed out, for inquiry, I do not know that it is quite statistical, but it involves a detailed examination of the circumstances, prices and wages, and all that sort of thing, and that is supplemented by saying: You must produce your books, and you must show us this and that which is incidental, and makes the whole thing stand as one consistent code; if you are asked you would say that is a matter which is in relation to a specified class of criminal law, and therefore our argument is this—I have not gone over the ground Mr. Duncan has gone over, I hope, though I am most deeply indebted to it, and I include it—but I can put my submission if I may under four heads, and if your Lordships would allow me to leave the rest of the argument to my learned friend Mr. Clauson I shall be obliged, especially as I feel that I am having a very special indulgence at your Lordships' Board, for which I am most grateful.

VISCOUNT HALDANE: It is a most important case.

Sir JOHN SIMON: It is. I should say when you contrast section 91 and section 92, this law is not in relation to any one of the 16 classes of subjects assigned to the province. I do not want to repeat the argument, but in order to determine that we have to read section 91 as well as section 92. When I say that, I do not mean that one shuts one's self up in a room with section 92 and nothing else, but one reads section 91, and section 92, and considers what light section 92 throws on section 91, and my argument is that as the result of that it does not really come within any one of the 16 enumerations in section 92. I submit, secondly, that if it did, which I altogether dispute, it would the more nearly come under the sixteenth head, the last one, than any other, the head, "local or private nature in the province". But it is not under that, because it is a thing which is in relation to and affects the body politic of the whole Dominion. Your Lordship remembers the passage in 1896 Appeal Cases, at pages 360 and 361, which puts it very clearly. I will not break into an argument again, but what I meant was this. In the *Attorney General for Ontario v Attorney General for the Dominion of Canada*, Lord Watson says this: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interests of the Dominion". In the same way, on the previous page, 360, referring to sections 91 and 92: "These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance". If your Lordships finally turn over to the Answers to the Questions, this was a case where there were some questions put, the answer to the third question, on page 371, is: "In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the provincial legislatures would have jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and

conditions as to make its prohibition a merely local matter in the province". Therefore, I should submit, as a second proposition—the merits of the argument can be judged—that if indeed this did come within any clause and that it was in relation to one subsection in section 92, the one really would have been No. 16, and that is prevented by the evidence here, and the very powerful argument of my friend Mr. Duncan. Then, thirdly—I have given up my hypothesis against myself now—I say if I am right in saying that its pith and substance is not in relation to—

LORD ATKINSON: What is it affects the body politic of the whole Dominion? Is it the evil legislated against, or the act of the legislation? Must it be the evil legislated against?

Sir JOHN SIMON: I think so. Take temperance. The ground on which it is said you are not really trenching upon property and civil rights, if you say you must set a standard for the people of this Dominion which they will adopt if they think fit by local option, which will amount to prohibition, is exactly that.

LORD SALVESEN: That is the illness that affects the body politic?

Sir JOHN SIMON: That is the illness that affects the body politic, that is the plague.

VISCOUNT HALDANE: Suppose everybody in Ontario took to carrying rifles, they might turn it into an army.

Sir JOHN SIMON: They are not people of that sort, I should hope and believe. Thirdly, I was going to put this: If my first proposition is right, if it is in relation, it is one of the sixteen heads in section 92, and if it is not within the enumeration of section 92, then the Respondents must win whatever be the true head under section 91. There I bring in the reflection that it is an interesting circumstance that when you come, as late as the year 1900, to frame the Constitution for Australia, this particular thing has developed to such a point that the topic of national disputes is a topic which is enumerated in terms.

VISCOUNT HALDANE: If it is not within section 92, you are within the general words, peace, order and good government.

Sir JOHN SIMON: Yes. I am going to say, lastly, in a sense you may say I am assuming I have jumped the stile and am now simply walking about in the meadow, if I say it is not in relation to No. 16 in section 92, even then the Respondents must win, and, as your Lordship said, they must win without condescending upon the putting of what particular head; and, finally, if I am asked about the head, which is a perfectly fair question to be put, I submit you have to consider criminal law; I am not in any way abandoning the argument of trade and commerce, but I see difficulties about that argument, of course both those heads are special heads, before ever I come to peace, order and good government, and consequently, if that course of reasoning is right, by whatever road I reach the destination, I do reach the destination that the decision which was arrived at by the majority of the Appellate Court in Ontario is right and ought not to be reversed. My Lords, I am extremely obliged to your Lordships for allowing me to intervene in this way.

VISCOUNT HALDANE: It is a most reasonable request.

Mr. CLAUSON: May it please your Lordships. I appear with my learned friend Mr. Wylie for the Attorney-General of Canada, and it is my duty to put the matter to your Lordships, and offer your Lordships any assistance I can in the matter from the point of view of the Government. I have listened with great care, and, your Lordships will forgive me if I say, admiration, to the arguments put before your Lordships by my friends Mr. Duncan and Sir John Simon. I do not feel that anything I could add now would really assist your Lordships, and I propose to confine myself to a very narrow compass. My Lords, it is my duty to tell your Lordships this, that the Government of Canada attach great



importance to this case from this point of view, it is a point of view that may be of assistance to your Lordships, that this legislation was dealing with the mutual rights between employers and employees, the rights of one to strike against the other, and the rights of the other to lockout the one; if that were all the legislation was dealing with, the position would be different, but at least I may say this, the view of the Government and the view I am instructed to present to your Lordships is this, that this legislation is legislation passed in the interests of a third party, namely, in the interests of the State as a whole. It is not a question of saying to A. the employer, or to B. the employee: We are going to interfere with you, we are going to decide whether you, A. are right or wrong, or you, B. are right or wrong; that is not the position. The whole of the legislation is to protect the interests of good government and order of the State and interests of the ordinary citizens against the results which will flow from A. and B. not settling their mutual affairs in such a way as shall prevent disorder and discomfort, indeed, having regard to the recent history of labour disputes in Canada, I should not be wrong, I think, if I used far stronger words than "disorder" and "discomfort". Your Lordships have heard from Mr. Duncan what occurred in Canada and what may occur again. It is from that point of view that I am instructed to present the matter to your Lordships. I do not think, therefore, I should be assisting your Lordships if I tried to differentiate between the various heads under which, from the point of view of the Government, this legislation can be justified. I venture to submit to your Lordships that the whole matter is summed up in this, as Sir John Simon put to your Lordships: The Appellants have got to show that this legislation is in a true sense legislation in relation to something which is within the exclusive provincial domain of legislation, and if they fail to do that, they fail on this appeal. I am not going to spend time in refining to your Lordships upon trade or commerce or criminal law, or peace, order and good government; it suffices if the Appellants fail to bring themselves within the exclusive provincial power for the Respondents to succeed. I am much obliged to your Lordships for giving me this opportunity of adding a few words, and with that I propose to leave the matter in your Lordships' hands.

MR. STUART BEVAN: My Lords, at the close of the Respondents' arguments, it appears to me, in my submission in reply, I have to deal with two main points, the one point raised by my learned friend Mr. Duncan, which is this, the main point raised by him, which, as I understand it, is this, that one has to regard the aspect of this legislation, and to see whether it deals with a Dominion-wide subject, or to see whether it falls within a Dominion-wide subject, or is merely a matter of local provincial concern and interest. The other matter that I shall have to deal with is my learned friend Sir John Simon's argument, which takes the bold line that this is primarily or essentially and altogether criminal law and nothing else. Now perhaps it would be convenient that I should deal with that first. I venture to think that the bold submission made by my learned friend is actuated by the feeling that it is necessary in this appeal to distinguish the present case from the case of the Board of Commerce.

VISCOUNT HALDANE: You have come now to what, to me, is the great difficulty in the case. Sir John puts it that, looking at this Act, it is really an Act to repeal the Statute of Conspiracy. I suppose you answer: Looking at the Act, it is an Act restricting civil rights on the face of it. Well, Sir John might answer: Really, whatever its form, it is an Act to alter the law of conspiracy. I want light upon this. Can you say the law of conspiracy is all based upon civil rights, that part of the law that we have to deal with anyhow, that the law of conspiracy is, you are not to combine to do what would be an assertion in the case of the individual, of a civil right, a combination of conspiracy within the law that comes in and makes that legal. If, therefore, you take away the civil right, it is combination or conspiracy within the law. You say they come in and

make that law, and, therefore, take away the civil right, not by adding to the law of conspiracy, but, you say, you only do it by taking away the civil right.

Mr. STUART BEVAN: If you please.

LORD DUNEDIN: I have sent for the Report of the Commission on which I sat, and there is a special heading dealing with the law of conspiracy in the first three lines of the Report, which was written by myself, and concurred in by the others. "The subject of the law of conspiracy is peculiarly involved, and it is perfectly impossible to reconcile the opinion and dicta which have been pronounced by Judges and writers and authors on the matter".

Mr. STUART BEVAN: Fortunately we are relieved from entering into any elaborate submission as to the law of conspiracy, because my case is that this statute goes far outside and beyond conspiracy, whatever view may be taken as to what conspiracy is in law.

VISCOUNT HALDANE: Yes. I think it is very important that you should clear our minds upon that subject. I have had some difficulty over the question. Perhaps if it is convenient to you, you could take this stage first in your reply.

Mr. STUART BEVAN: If your Lordship pleases, I should be very glad to do that. It is perhaps not unimportant to remark that in this amendment of the criminal law, as it is presented by my learned friend, Sir John Simon, it is not until the 56th section of the Statute is reached that there is any reference to any offence or penalty, or anything else.

VISCOUNT HALDANE: There is nothing about conspiracy in the early words. It simply takes away the civil right of an employer to declare a lockout, or of an employee to go on strike.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: Take the simple case of a striker, all he does is to say: I will not work; it does not matter whether other workers say the same or not. What this Act says is: You are not to exercise that civil right, which is not touched by the law of conspiracy.

LORD ATKINSON: One employer might lockout.

Mr. STUART BEVAN: Yes.

LORD ATKINSON: One man cannot conspire.

VISCOUNT HALDANE: No, he can go on strike, he can lockout or go on strike, and it may be very serious. If I am a watchmaker, and my best employee, the man who adjusts the main springs goes on strike, I cannot make any watches and there may be nobody else who can.

Mr. STUART BEVAN: The sections in question, section 56 onwards, are not limited to providing for penalties in the case of a lockout and strike alone, the penalties go to matters outside strikes and lockouts altogether, as I shall endeavour to show your Lordships in a moment. When we look at the Act itself, this amendment of the Criminal Law or addition to the Criminal Law of Canada, one finds on page 11 it is: "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities". That is specified to be the subject of the Act, and the first 55 sections deal entirely with the creation of a Board, the functions and powers of the board, and the manner in which the appointment of the board may be called for, and there is nothing in all that deals with the law of conspiracy, or deals with strikes or lockouts in any way except the definition section on page 12 (f) and (g).

LORD SALVESSEN: I was looking at strike as defined there, it says: "The cessation of work by a body of employees acting in combination".

Mr. STUART BEVAN: Yes.



LORD SALVESEN: So that that would exclude the idea of a single person going on strike.

Mr. STUART BEVAN: Certainly; but I am going to endeavour to satisfy your Lordship in a moment that when one looks at section 57 and section 7 of this Act, the provisions in that section go outside strikes and lockouts and deal with disputes.

LORD ATKINSON: A lockout may be done by one man, and the definition of it means: "A closing of a place of employment, or a suspension of work, or a refusal by an employer to continue to employ any number of his employees in consequence of a dispute, done with a view to compelling his employees, or to aid another employer in compelling his employees, to accept terms of employment". One man can lockout.

Mr. STUART: One man can lockout.

LORD SALVESEN: But he must do it in order to aid another.

Mr. STUART BEVAN: Yes, he must do it with an ulterior purpose.

VISCOUNT HALDANE: He is entitled to close his shop if he finds he cannot make it pay. It is disjunctive "Compelling his employees or to aid another employer".

LORD SALVESEN: That I quite agree.

LORD ATKINSON: It is quite legitimate to say I must decrease your wages, if you do not agree to that I will lockout.

Mr. STUART BEVAN: Yes. This Act does not declare, I think this is a point that ought to be emphasized, a strike or lockout is illegal; a strike or lockout is perfectly legal.

LORD ATKINSON: The great object is conciliation and agreement.

Mr. STUART BEVAN: Yes.

LORD ATKINSON: And you are not to endanger that by, while negotiation proceedings are pending, either locking out or striking.

Mr. STUART BEVAN: Yes, my Lord, and the moment the board has met and has failed to get the parties to a dispute to agree, and the moment it has issued its report stating the facts and circumstances of the dispute, the strike or lockout can go on merrily and the law cannot prevent them.

LORD DUNEDIN: If you take Sir John's argument as I understand it, they did not need to say that a strike was illegal because it was illegal at Common Law.

Mr. STUART BEVAN: I ought to tell your Lordship my learned friend has been good enough to look into this matter and there is another Statute.

LORD ATKINSON: It is not to prohibit absolutely either strikes or lockouts, but to prohibit striking or locking out while proceedings are pending.

LORD DUNEDIN: That is this Act. Sir John's point was you did not need to say that a strike or lockout was illegal, it was illegal at Common Law.

VISCOUNT HALDANE: The whole idea was criminal law therefore.

LORD DUNEDIN: To test that by the third section of the Act of 1875 it says: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." That altered the law. Before that Act it was punishable as a crime. Sir John's view, as I understand, is that inasmuch as the Act of 1875 did not apply to Canada it was the old Common Law.

MR. STUART BEVAN: I ought to tell your Lordship my friend has looked into it and has found that there was in 1872 a Trade Unions Act passed by the Dominion of Canada. I think your Lordships ought to know this, whether it assists my argument or not.

VISCOUNT HALDANE: Certainly we ought to know it.

MR. STUART BEVAN: It is the Trade Unions Act of 1872. This followed the 1871 Act; it is 35 Victoria, Chapter 30. Then for the purpose of your Lordship's note it is in the Revised Statutes for Canada of 1896.

VISCOUNT HALDANE: You mean it is reprinted?

MR. STUART BEVAN: Yes, it is the Revised Statutes, Chapter 131, Section 1.

VISCOUNT HALDANE: We had better have it in 35 Victoria.

MR. STUART BEVAN: It is altered I am told in some respects.

VISCOUNT HALDANE: We will take the 1872 form as it was.

LORD SALVESEN: I understand you have to consider the law as in 1867, and it was the Common Law that combination was an illegal thing.

MR. STUART BEVAN: In my submission that construction cannot be given to sections 91 and 92.

VISCOUNT HALDANE: Suppose it was so. Suppose that in 1867 strikes were included in illegal conspiracies, then came 1872 which may or may not have altered that, but when you legislate in 1907 under the Lemieux Act, strikes, you say, were no longer part of that law.

MR. STUART BEVAN: Yes, it is quite irrelevant to consider what powers there are under section 91 that go back to 1867.

LORD SALVESEN: The Act you refer to was a Dominion act which made strikes legal in the Common Law as in England.

MR. STUART BEVAN: It follows substantially, if not strictly, the Act of 1871.

LORD DUNEDIN: Is not this double-edged to you? If the Dominion did legislate as against strikes in 1872 that showed that really the topic of strikes fell under the Criminal Law, otherwise they could not do it.

MR. STUART BEVAN: I appreciated the risk that I ran of that criticism being levelled against me, and I propose to deal with it, if I may.

LORD DUNEDIN: It did not require any great ingenuity on my part to see it.

MR. STUART BEVAN: It is a point I quite appreciate.

LORD ATKINSON: It took away from Trade Unions some of the elements that the Act of 1871 did in England.

MR. STUART BEVAN: It substantially followed it.

VISCOUNT HALDANE: It says: "This Act may be cited as the Trade Unions Act, 1872."

MR. STUART BEVAN: May I read the heading: "Criminal Law Amended"; we rely upon that. Then there follow five sections dealing with the amendment of the Criminal Law.

VISCOUNT HALDANE: We must go through them; it is a very critical point for you.

MR. STUART BEVAN: Yes. Section 2 says: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

LORD ATKINSON: That is the purpose of the enactment?

MR. STUART BEVAN: Yes. Then section 3: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust"; identical with this is section 74 of the Act of 1871.



VISCOUNT HALDANE: Is there anything else there?

Mr. STUART BEVAN: No, that is all we get there. Then we get to section 6 which is headed "Registration of Trade Unions" and those sections go down to and include section 12. Then section 13 onwards "Registry of Trade Unions." I have not had an opportunity of reading the whole Act through and comparing it with the Act of 1871, but I think I am correct in saying substantially you will find it is the same enactment as our own Act of 1871. It will be said against me at once, as was indicated by Lord Dunedin, some at any rate of these provisions are headed "Criminal Law Amended", but some of these provisions might well be said in one aspect to interfere with civil rights within the province, the provision for instance as to registration of Trade Unions, or even the earlier provision under section 4: "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements", which are specified. All those matters it may be said, if my argument in the present case is right, create a difficulty, but, my Lord, my answer to it is that it may very well be, I do not know whether the matter has ever been considered, at all events it has never come before this Court, that some of these provisions in the Trade Unions Act of 1872 upon inquiry and investigation and argument might well be declared to be outside the power of the Dominion Government.

VISCOUNT HALDANE: Let us see what the Act really does; its primary purpose is to declare that the purposes of a Trade Union are not simply, because they are in restraint of trade, to be any more unlawful.

LORD DUNEDIN: May I remind you, and Lord Atkinson particularly, you have already called attention to the fact that this Canadian Act of 1872 is just a repetition of the Act of 1871.

VISCOUNT HALDANE: That is so.

LORD DUNEDIN: That was found to be an unfortunate Act in this country, and had not effected the purpose wanted.

VISCOUNT HALDANE: It did not go far enough.

LORD DUNEDIN: In the *Gas Stokers'* case it was held that the provisions of the Act of 1871 had not in fact affected the common law of conspiracy for which an indictment would still lie; therefore it was that we have the Act of 1875; Therefore I am only doing justice to Sir John Simon; if he were here he would say this Act of 1872 had not affected his statement that at common law the thing would still be illegal.

VISCOUNT HALDANE: Yes, but Trade Unions were no longer found to be illegal.

Mr. STUART BEVAN: There was the Act of 1871 and the amending Act of 1875, and, again speaking without having an opportunity of comparing the two, I think some of the provisions at any rate of the Act of 1875 are to be found set out in the Canadian Act of 1906, the Revised Statutes, Chapter 131, section 1.

VISCOUNT HALDANE: Was the Lemieux Act directed to the law of conspiracy, or for another purpose?

LORD ATKINSON: I suppose it was brought into conformation with the Act of 1875.

Mr. STUART BEVAN: I think your Lordship will find the Act of 1906 brought the matter in line with the English legislation.

VISCOUNT HALDANE: The Lemieux Act is purporting to deal with something which was treated, rightly or wrongly, as being lawful, and it was declared not to be lawful if a Board was set up.

Mr. STUART BEVAN: Strikes and lockouts were lawful after the passing of the Act of 1872. At the time of the Lemieux Act they were lawful; there was nothing illegal about them.

VISCOUNT HALDANE: I want to be quite sure. Strikes had been legalized by the Act of 1872. The words of the Lemieux Act go further; they deal with various matters, but they deal with them on this peculiar footing, they are all treated as lawful, and it is a restricting Act, it is not altering the criminal law, but rather enacting the criminal law?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: It does it by reference to civil rights, and then adding penalties for violation of the new restrictions?

Mr. STUART BEVAN: Yes. The Act is not confined to the position of regulating or suspending the right to strike or to lock out; it goes far beyond that in my submission when one looks at the terms of section 57.

LORD ATKINSON: It says strikes and lockouts shall not be indulged in pending the decision of the Conciliation Board.

VISCOUNT HALDANE: It seems to me to assume you are legally entitled to strike or lock out, but for a period you are not to do it; it is a new offence created.

LORD ATKINSON: It qualifies the general words.

Mr. STUART BEVAN: The argument put forward against us is this: That all the Act does is to deal with the subject of criminal law at the time of the passing of the British North America Act. When one looks at section 57 one sees it goes far outside criminal matters at the date of the British North America Act. I want to make that good.

LORD DUNEDIN: I do not find in the Statute you refer me to anything corresponding to section 3 of the Act of 1875.

Mr. STUART BEVAN: My friend, Mr. Duncan, is very familiar with the Statute and he is good enough to find it for me. It is section 32 at the end of Chapter 125.

LORD DUNEDIN: Pardon me, that is a perfectly different thing, it is in restraint of trade. The third section of the Act of 1875 was not that at all, it was this: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." That is a perfectly different thing from the difficulty that arises from a Trade Union being an illegal body in restraint of trade.

Mr. STUART BEVAN: I will see if I can find anything else.

VISCOUNT HALDANE: What is section 32?

Mr. STUART BEVAN: "The purposes of any trade Union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful."

VISCOUNT HALDANE: That is Trade Unions.

Mr. STUART BEVAN: Looking through it with the assistance of my learned friend, Mr. Duncan, I do not see that section 3 enacts it.

LORD DUNEDIN: I am sorry to reiterate it, and I am only doing it in the absence of Sir John Simon; I do not want to plead the case against you; I am doing his argument a little justice; I think he would still say at common law still these acts are illegal.

VISCOUNT HALDANE: I would like to be sure there is no other Canadian Statute that affects this point that has emerged. Has it been considered?



Mr. STUART BEVAN: Mr. Geoffrey Lawrence has just handed me the Criminal Code which deals with offences connected with trade and a breach of contract. It is section 496: "A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade". Then section 497: "The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section". That is the Act of 1871.

VISCOUNT HALDANE: There is nothing else in the Criminal Code.

Mr. STUART BEVAN: No, my Lord.

VISCOUNT HALDANE: They were watching so closely in Canada these changes that took place here that I am surprised they did not pass legislation.

Mr. CLAUSON: My learned friend, Mr. Duncan, has prepared for the assistance of all of us a very careful note tracing the whole of the Trade Union legislation; I think he did refer to some of it in his address to your Lordship, and if your Lordship would like to be furnished with particulars of all the Acts we can easily do it.

VISCOUNT HALDANE: We would like very much to know one thing: Mr. Duncan will be able to tell us whether there is anything either in the Criminal Code or in any other Statute which enacted what corresponded to section 3 of the Act of 1875 here, that what is illegal if done by a number of people is not to be illegal if it could be done by one of them.

Mr. DUNCAN: May I look that up?

VISCOUNT HALDANE: Yes, if you please, look it up from your note and tell us later.

Mr. STUART BEVAN: I am sorry I have not had an opportunity of putting myself in a position to assist your Lordships; till my learned friend, Sir John Simon, took this point about criminal law it did not occur to one.

VISCOUNT HALDANE: The other point is: What does the Lemieux Act really do; does it do anything else but restrict what were assumed to be things people were entitled to do?

Mr. STUART BEVAN: In my submission the Lemieux Act goes far outside strikes and lockouts, very far outside matters which at the time of the passing of the British North America Act were the subject matter of criminal law. It all turns on sections 56 and 57, which are to be found on page 23 of the Joint Appendix; section 56 in terms deals with strikes and lockouts: "It shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act". I need not read the rest of it, it deals with nothing but strikes, lockouts and the suspension of the right to declare either the one or the other.

LORD ATKINSON: Striking or locking out is a crime, and that says you must not commit it.

VISCOUNT HALDANE: If there is a Board. If the draftsman had thought it was illegal without anything of the sort happening one wonders why he did not say so.

Mr. STUART BEVAN: At that date, in my submission, the date of this Act, neither a strike nor a lockout was illegal; it was legal at the date of the Lemieux Act in virtue of the Canadian Trade Union legislation.

LORD ATKINSON: The earlier legislation took away the criminal element of combination?

Mr. STUART BEVAN: Yes, and therefore when the Lemieux Act was passed strikes and lockouts were perfectly legal.

VISCOUNT HALDANE: All that remained was that the *Gas Stoker's* strike was contrary to the common law of England.

LORD SALVESEN: If it was competent for the Dominion Parliament to declare a thing that had previously been illegal to be legal, would one not have thought it equally competent for the Parliament to reverse the process, as you say they have done in parts?

Mr. STUART BEVAN: I have not considered it, but it might very well be that if they passed an Act to amend the Trade Unions Act, to amend the criminal law, which was the declared purpose of part of the Trade Unions Act, it might very well be; but that could be done in two sections; you would not have provisions in sections 56 and 57 of an Act which in 55 sections dealt with interference of civil rights.

VISCOUNT HALDANE: Lord Salvesen is putting this: That if they could do one thing, why cannot they do the converse thing; why should not they declare something that was legal to be illegal, and annex penalties to it?

LORD SALVESEN: Yes.

VISCOUNT HALDANE: Suppose, which is very remote from this case, that they had passed an Act that it was to be unlawful for anybody to own land in the province of Ontario, you might say in pith and substance you are interfering with the right to own land in Ontario, which is a civil right.

LORD SALVESEN: I suggest that civil rights must be construed as having reference to the civil rights existing in 1867, not to any civil rights that may come into existence as a result of the Dominion Parliament legislation thereafter.

VISCOUNT HALDANE: That would carry you very very far; must not it be whenever you legislate under section 91 you must look at the state of the law as it is then and see what are the civil rights?

LORD SALVESEN: It may be so.

Mr. STUART BEVAN: Your Lordship will appreciate that since 1867, the provincial legislatures may have created all sorts of new civil rights, and may have cut away civil rights altogether that existed in 1867.

LORD ATKINSON: When you take the Act of 1906, are not you to look at all the legislation that has gone on and consider and see how it has left the question of lockouts and strikes?

LORD DUNEDIN: I cannot take from you what you said a moment ago; it may be right or wrong; you calmly assented to Lord Atkinson's conclusion and you have no business to do it; you said strikes and lockouts were legal at the time of the Lemieux Act. Lord Atkinson then brought to your notice what had been done in 1871 and 1875 in this country, but that legislation did not apply to Canada. I have yet to see in black and white how it is that strikes and lockouts were legal in Canada even in 1906.

Mr. STUART BEVAN: May I endeavour to show your Lordship?

LORD ATKINSON: The Canadian Act blotted out the criminal element of restraint of trade.

LORD DUNEDIN: Of Trade Unionism. A strike or a lockout was illegal as a strike or a lockout in England, quite apart from a Trade Union.

Mr. STUART BEVAN: I am now reading the Act of 1872, the Canadian Act. "The purposes of any Trade Union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such Trade Union liable to criminal prosecution for conspiracy or otherwise."

LORD DUNEDIN: What has that to do with the question put to you?

Mr. STUART BEVAN: I would submit that a strike is in restraint of trade and a lockout is in restraint of trade.

VISCOUNT HALDANE: These are not Trade Union matters; they may be, but they are not necessarily.

Mr. STUART BEVAN: Not here.



VISCOUNT HALDANE: The gas-stokers were not prosecuted as members of a Trade Union.

MR. STUART BEVAN: My learned friend refers me again to the Criminal Code in the Revised Statutes of 1906, Chapter 146, at section 498, which may provide the answer. I am sorry I have not had an opportunity of looking into this. Section 498 says: "Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,—(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or, (b) to restrain or injure trade or commerce in relation to any such article or commodity; or, (c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property. 2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees."

LORD DUNEDIN: That is no answer. Section 498, which you have just read, makes a new offence in certain heads, and then says: As regards this new offence, so and so.

MR. STUART BEVAN: It seems to recognize that combinations of workmen for their own reasonable protection is a thing perfectly legal, that is as far as I can go at the moment.

LORD DUNEDIN: You are taken at a great disadvantage on that. I am not complaining, because this argument of Sir John Simon's was quite new, and there is not a trace of it in the judgments in the Court below, and, as I said, you are at a great disadvantage; do not think I do not sympathize with you, because I do, but that does not enable me to swallow, because you are at a disadvantage, something that does not satisfy me.

MR. STUART BEVAN: I may have an opportunity later of seeing if the section of the 1875 Act finds its way into any Canadian legislation. May I say that in my submission the considerations with regard to the law of conspiracy, the position of strikes and lockouts, is wholly irrelevant to the discussion in this case. If I am right upon that, that absolves me from the necessity of investigating the matter with regard to this later point that has been taken against me. Now my ground for submitting that is to be found in section 57 of the Industrial Disputes Act. Will your Lordships be good enough to look at it, that is section 57 of the Lemieux Act? It goes further, in my submission, than dealing with strikes and lockouts, which, according to the other side, were matters of criminal law at the time of the passing of the British North America Act. It says: "Employers and employees shall give at least 30 days' notice of any intended change"; this has been altered on page 30 by the amending Act, section 57, and I had better read the amendment: "Employers and employees shall give at least 30 days' notice of an intended change affecting conditions of employment with respect to wages or hours." Now, stopping there for a moment, that deals with all cases, it places every employer and employee under this obligation to give 30 days' notice, irrespective of the fact as to whether strike or lockout is in contemplation or not; it is a very wide invasion of the civil rights of an employer or employee.

VISCOUNT HALDANE: I wish you would not go so fast; I want to see this, there may be nothing in it, but I want to see what the provisions of section 56 say. It is drawn in such a way as to require careful consideration: "Provided also that, except where the parties have entered into an agreement under Section 62 of this Act, nothing in this Act shall be held to restrain any employer from declaring a lockout, or any employee from going on strike in respect of any dispute which has been duly referred to a Board and which has been dealt with under section 24 or 25 of this Act, or in respect of any dispute which has been the subject of a reference under the provisions concerning railway disputes in the Conciliation and Labour Act." Does not that make it lawful, by implication, for employers to declare lockouts and for employees to go on strike?

Mr. STUART BEVAN: I should have submitted so.

VISCOUNT HALDANE: It is very important. It is in the form of a proviso. It looks rather as if it did.

Mr. STUART BEVAN: It seems to recognize that there is legislation somewhere. I may be able to find it, or there may be none.

VISCOUNT HALDANE: It may be the draughtsman thought it was all that was necessary to put in that proviso; you see what I mean, Lord Dunedin?

LORD DUNEDIN: I see the point.

VISCOUNT HALDANE: I daresay it is so unless this is drawn on the footing that they were getting rid of what was section 3 of the Act of 1875 in England in respect of strikes and lockouts anyhow.

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: It looks to me like a proviso saying that the common law of England is not to affect this.

Mr. STUART BEVAN: If I am right about section 57, it becomes really irrelevant to consider the law as to strikes and lockouts, conspiracy and so forth. Might I go to page 30.

VISCOUNT HALDANE: Section 57 again looks to me as if the draughtsman was assuming there he had said, or thought it was the law without even having said it, that it was perfectly lawful to strike or lock out.

Mr. STUART BEVAN: Yes, it does.

VISCOUNT HALDANE: The lockout is only one thing contrary to the provisions of this Act, a strike must be contrary to the provisions of this Act.

Mr. STUART BEVAN: That is another observation to be made upon it.

LORD DUNEDIN: It is declaring a lockout or going on strike after there has been a Board.

Mr. STUART BEVAN: If strikes and lockouts were illegal, one wonders what the necessity was for this particular piece of legislation or any legislation.

LORD DUNEDIN: Lord Haldane's point is against you there.

Mr. STUART BEVAN: Nowhere in the evidence is it suggested that there was any power of dealing with strikes or lockouts as being illegal combinations.

VISCOUNT HALDANE: We ought to be perfectly clear about this. The first provision is important: "Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike."

LORD DUNEDIN: It does not stop a man who says: I am going to shut up business because I do not want to go on.

VISCOUNT HALDANE: Or: I will not work for you any more, the workman may say. The proviso says, except where they have entered into an agreement; they may lock out or strike except where they have entered into an agreement under section 62; is that an agreement to agree to a Board?



MR. STUART BEVAN: Section 62 is an agreement to be bound by the recommendations of the Board.

VISCOUNT HALDANE: What is the other provision?

MR. STUART BEVAN: Sections 24 and 25 are the Report of the Board.

VISCOUNT HALDANE: Very well. Then it says that provided that, except where they have entered into an agreement which is to bind them in this way, nothing in the Act is to be held to restrain a lockout or strike?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: It is quite true it is only negative there.

LORD ATKINSON: They may settle a strike or lockout under 56, but not if the strikers say: We will go on with it contrary to the agreement. That is the only kind of strike or lockout as far as I can see.

LORD DUNEDIN: If you had had this agreement and had gone before the Board and the Board made their report, then after that has all been done and it is hoped it will be settled up, if it has not, you may go on to strike or lock out?

MR. STUART BEVAN: Yes, and the Statute only recognizes or gives the right after the expiration of that period and the happening of those events, to cause a strike or lockout.

VISCOUNT HALDANE: It makes a criminal provision: if you violate the exceptions, that is to say, the exceptions under 62, or until the board acts.

LORD DUNEDIN: It makes a criminal provision if you, so to speak, strike too soon or lock out too soon.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: If you violate what is enacted in respect of civil rights.

MR. STUART BEVAN: A question then arises whether the section constitutes a crime by then participating in a strike or lockout. There is no power of imprisonment, it is simply a fine. It may be this does not come within criminal law in the true sense of the word "criminal" at all. For the moment I am not dealing with that. I am assuming that all my learned friend has urged against me as to strikes and lockouts being illegal at the date of the passing of the Act in 1867 is irrelevant to this matter, and I will deal with that later. My first point is this, that the Act, by section 57, deals with things other than strikes and lockouts, and cannot be justified as being criminal law, because it deals with things that never have been and never could be within the meaning of criminal law.

VISCOUNT HALDANE: Let me get your first point.

MR. STUART BEVAN: My first point is that this law does not come within section 91, enumeration 27, because it deals with matters outside the criminal law altogether.

VISCOUNT HALDANE: That is the point you have just been making.

MR. STUART BEVAN: Yes. I want to make it good by referring in terms to the language of section 57.

*(Adjourned for a short time.)*

MR. STUART BEVAN: Your Lordship will remember that under section 1 of the Lemieux Act on page 17: "Any dispute may be referred to a Board by application in that behalf made in due form by any party thereto; provided that no dispute shall be the subject of reference to a Board under this Act in any case in which the employees affected by the dispute are fewer than ten." Then under the definition clause, which is on page 12, dispute includes various matters. You see various kinds of disputes; No. 7 is: "the interpretation of an agreement or a clause thereof," so that if an employer has an agreement with 10 of his workmen that they are liable to dismissal at a week's notice, or that

they are to work an 8 hour day, any workman, there being not less than ten, affected by the construction of that agreement can apply to the Board. It extends to matters outside matters which are properly described as matters appertaining to the criminal law. Now will your Lordships look at section 57 of the Act?

LORD SALVESEN: It is only such disputes as are likely to result in a strike or lockout. Reading section 21, which is the definition, it says that a dispute with regard to the interpretation of an agreement and affects ten or more may be referred to a Board.

Mr. STUART BEVAN: Yes.

LORD SALVESEN: And the provision with regard to it will be applicable.

Mr. STUART BEVAN: Yes. I got that from the definition of "dispute" on page 12, which makes no reference to a dispute of such a character as threatens a strike or lockout. Section 5 on page 13: "Wherever any dispute exists between an employer and any of his employees, and the parties thereto are unable to adjust it, either of the parties to the dispute may make application to the Minister for the appointment of a Board of Conciliation and Investigation." I think your Lordships will find that is the scheme of the Act throughout. Now may I come to section 57.

Mr. CLAUSON: Will my friend refer to section 17 before he goes on? There is to be a statutory declaration to the effect that a lockout or strike has taken place.

Mr. STUART BEVAN: That is on page 15, and it says: "The application shall be accompanied by a declaration."

LORD SALVESEN: That rather qualifies what you said, because it does seem that all the disputes are such as may lead to industrial trouble.

Mr. STUART BEVAN: That is if the applicant for a Board feels he is justified in making the statement which I agree is to be a statutory declaration.

LORD SALVESEN: Yes.

Mr. STUART BEVAN: Now I will go to section 57, which is on page 23, and as amended on page 30. This is the substantial view I am submitting that the provisions of this go far outside the region of criminal law, because it interferes with the civil rights of both employers and employees, which have no connection with the criminal law in any aspect: "Employers and employees shall give at least thirty days' notice of an intended change"—that is a provision as between employers and employees where the terms of the agreement, it is quite true, must involve 10 employees, but it affects the civil rights of employers and employees where the contract of employment in terms provides that the conditions of the employment may be changed from time to time at the will of the employer.

LORD SALVESEN: Will you assist me on a matter that is causing me some difficulty? Do you challenge the Trade Disputes Act of 1872?

Mr. STUART BEVAN: Except as to its criminal provisions which are declared to be criminal provisions I challenge it. A great many of the provisions of that Act are as to the constitution of Trade Unions.

LORD SALVESEN: I rather fancied you must, because if you do not, if you admit the legality of the Dominion Parliament to pass an Act of that description, it seems to me to follow that they may qualify it by subsequent legislation on the same topic.

Mr. STUART BEVAN: I do take that Act as being *ultra vires* in many of its respects.

VISCOUNT HALDANE: Your fourth proposition is that this is not an amending Act; it is an Act for other purposes?



MR. STUART BEVAN: That is so, it is an Act which regulates the rights of masters and men; it declares what the position as between masters and men shall be notwithstanding that the terms of the agreement of employment set up a different state of things from that declared by the Act to be binding upon the parties. It is the broadest and most complete evasion of the civil rights of an employer and employee, and it purports to be from the very construction of the Act. When one looks at its structure it does not start off as a criminal Act does by declaring certain acts to be criminal and punishable by fine and imprisonment. Then come the ancillary provisions which without that earlier provision of the Act would never have any effect. It says if you do not do the things you are called upon to do by this Act you shall be liable to a penalty to be imposed in this particular case, and in that particular case. That is the sanction which the Act provides.

LORD SALVESEN: You have the civil right to combine. Then according to the law as it stood in 1867 this is conferring a civil right rather than withdrawing it?

MR. STUART BEVAN: In my submission not. I am going to try and satisfy your Lordships in a moment that at the time of the passing of the Lemieux Act strikes were lawful, and strikes are not made lawful for the first time by the provisions of this Act. I will refer to it in a moment. My second contention which I shall have to elaborate further later on is, that it is not the position of things in 1867 which has to be looked at to determine whether this legislation or that is *intra* or *ultra vires*: you must look at the position when the statute, which is being attacked, was passed. Let me take an example. Civil rights within the province are matters that vary from time to time according to the particular legislation of the particular province, and what may have been a civil right in 1867 in the province may well have ceased to be a civil right in 1906. Similarly there may be some civil rights created in the province by the Provincial Legislature after the year 1867, and to test the position as to whether at the time of the passing of the Lemieux Act civil rights are interfered with, one must look at existing civil rights at the date of the alleged interference, because it would be a matter of academic interest, to put it at the highest, to say whether any particular legislation in the year 1906 interfered with civil rights as they existed in 1867. I am coming back to that in a moment if I may develop my submission on section 57. Looking at page 30 for the moment, there is this interference created by the first three lines of the section. No matter what the contract between the parties is, 30 days' notice at least must be given for a change of conditions. It has a tremendously wide scope. Supposing a workman were being employed in workshop A, and the master said: I am going to employ you in workshop B, that would be a change in the conditions of employment, and the workman would say: No, I must have at least 30 days' notice of your intention to transfer me to workshop B; it is making an alteration in the conditions of my employment; I am dissatisfied with it, and I shall apply for a Board.

MR. CLAUSON: The words are "in respect of wages or hours".

MR. STUART BEVAN: Yes, it is only another illustration. Supposing the contract of employment provided for the working hours each day to be such a number, 7, 8, 9 or 10, or whatever it may be, the employer from time to time shall decide that would be the contract between the parties, and the workman would be bound by the decision of his employer. This at once tears up the contract for 30 days at least and for longer, because if the Board sits after the 30 days its report may be much more than the 30 days, the contract entered into by the parties is torn up and a new contract is substituted by the provision of the Legislature, and it goes on: "and in the event of such intended change resulting in a dispute, until the dispute has been finally dealt with by a Board, and a

copy of its report has been delivered through the Registrar to both the parties affected, neither of those parties shall alter," I am going back to page 23, the condition of employment with respect to wages or hours. That, in my submission, is an invasion of civil rights in the province, but it does not end there.

LORD SALVESEN: That is only in the event of its being the result of a strike or lockout.

Mr. STUART BEVAN: Yes, not in the event of the Local Authorities or the Minister of Labour certifying that a strike is likely, but in the event of one of the parties to the dispute saying that a dispute is likely, which is a very different thing. As a matter of fact the case must be judged by its particular facts, although if I succeed here the decision will be a far reaching one. In this case the evidence as I shall show your Lordships in a moment makes it very doubtful as to whether there would ever have been a strike at all.

VISCOUNT HALDANE: If they say that was the purpose of this Act that may be used against it.

Mr. STUART BEVAN: Yes, but it shows what little value there is in the declaration as to a pending strike.

VISCOUNT HALDANE: It may be that this statutory provision has averted strikes.

Mr. STUART BEVAN: I do not know about that, because a statutory provision was invoked here when the appointment was made, the Board was restrained from sitting, and there has never been a strike. May I go on with section 57, because it does seem to me to be one of the utmost importance? Will your Lordships look at page 23, section 57?

LORD ATKINSON: Assuming it was illegal to do this, and there is a statute saying you shall not do it for 30 days, is that criminal legislation?

Mr. STUART BEVAN: If this legislation declares strikes to be illegal I might have more difficulty than presents itself to my mind at the moment. This Act has not declared strikes to be illegal, and, in order to invoke criminal law as a justification for this Act, in my submission the Act must declare strikes to be illegal, and it does nothing of the kind. Indeed it recognises the rights of the citizen to strike, and all the Act does in effect, in my submission, is to say that if you do a perfectly legal thing, which the criminal law allows, within the close season, within the 30 days, you shall be liable to a penalty. In my submission that is a direct interference with the civil right which is recognised by the law in Canada to strike, and to dispose of your labour as you think best. If the Statute provided that strikes were illegal that would be another matter. Such a case may arise when there is Dominion legislation declaring all strikes and lockouts to be illegal, or to be illegal unless first sanctioned by the Minister of Labour. That is a criminal enactment declaring a certain act on the part of employers or employees to be illegal, but this Act falls short of that altogether. Throughout the whole of the 60 odd sections of the Act the legislation recognizes the strikes as being legal under the provisions of the Lemieux Act, and legal by reason of the provisions of the criminal code, because strikes are expressly excepted from the criminal acts set out in the criminal code.

LORD WRENBURY: Either the prohibition or allowance of strikes is Dominion legislation or it is not?

Mr. STUART BEVAN: Yes.

LORD WRENBURY: Which do you say it is?

Mr. STUART BEVAN: I should think it was Dominion Legislation in exercising the powers under section 91 (27).

LORD WRENBURY: You say it is Dominion Legislation?



Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: You must say so having regard to your first proposition?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: And that the common law position was removed by the Act of 1872, because it is within the jurisdiction of the Dominion Parliament to legislate with regard to strikes being legal or illegal.

Mr. STUART BEVAN: This has not declared strikes to be illegal at all. It recognizes the right of the citizen to strike; it controls the action of the citizen in the exercise of his civil right to strike.

LORD WRENBURY: Every legislation interferes with the rights of a citizen?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: You have to make sections 91 and 92 work somehow.

Mr. STUART BEVAN: These are civil rights not within section 91. If it was within section 91 that would be another matter. I place no reliance upon interference with section 91. My learned friend is pressed because he is endeavouring to bring it within section 91, because it is criminal law. If the Dominion Legislature had enacted that all strikes shall be illegal throughout Canada, I do not think I could have complained before your Lordships that that legislation was *ultra vires*, because it is creating a criminal offence; it is making a strike a crime. If it has said anybody guilty of striking shall be liable to imprisonment that would be criminal law. This is not criminal law in my submission at all, because it recognizes the right of the subject to strike, and what this particular legislation, the Lemieux Act, does, in fact, is to say: We recognize your right to strike; that is a civil right which you have; we are going to interfere with the exercise of that civil right to strike. It recognizes the right to strike, but suspends the exercise of that right. That is how I should put it.

VISCOUNT HALDANE: It makes a strike illegal *sub modo*?

Mr. STUART BEVAN: Yes.

LORD ATKINSON: There is a close time for striking.

Mr. STUART BEVAN: Yes, but a strike is legal, because as soon as the close time has expired the interference with the civil right of the citizen to strike disappears. A strike is, after all, only the exercise of the liberty of the subject to dispose of his labour as he will. It is not only the question of the right to strike here, though that is my main contention. This Act, which is said to be legislation with regard to criminal law, upon a little closer examination of section 57, shows that it imposes all sorts of restrictions upon civil rights that in no sense can be regarded as having anything to do with criminal law. It is that which I am endeavouring to develop by reference to section 57 on page 23. I will go on after the amended part: "neither of the parties nor the employees affected shall alter the conditions of employment with respect to wages or hours, or on account of the dispute do or be concerned in doing, directly or indirectly, anything in the nature of a lockout or strike, or a suspension or discontinuance of employment or work, but the relationship of employer and employees shall continue uninterrupted by the dispute". So that the position would be this, and I must judge of the position by putting particular cases, that even if the person invoking the appointment of a board was able to make his statutory declaration as to the probability or the certainty of a strike, if a board was appointed, and after the appointment of the board the possibility of a strike disappeared, none the less the two parties would be tied to their agreement; they would continue the relationship of employer and employee until the report of the board was issued. It is to be observed, and here, again, I am relying on this as supporting my contention that section 57 goes far outside anything that can be regarded as within

the scope of the criminal law, there is no penalty imposed, and I submit it is a direct interference with civil rights.

LORD ATKINSON: What do you say about sections 58 and 59?

Mr. STUART BEVAN: Section 58 only deals with employers declaring a lock-out; section 59 deals with employees going on strike; but the relationship of employer and employee provided for in section 57 is to be declared to continue uninterruptedly. He is exercising his civil rights, and it is not declared to be a criminal offence; it is not declared to be subject to a penalty, and yet my learned friend's whole contention is that this act from beginning to end is an enactment relating to the criminal law which can only be tested by seeing whether that is so, and the result of a careful reading of section 57 shows that it does not attempt or purport to attempt to create a criminal offence; it imposes no penalty, but it creates a statutory interference with the civil right of the employer to continue the employment of his employee. That is only a subsidiary point. My main point is that it is impossible, taking a proper view of the statute, looking at its structure, having only at the end these penalties, which in certain cases are imposed as a sanction for the purpose of making the statute effective, it is impossible to describe this as a criminal statute competent to the Dominion legislature to pass under section 91 of the act. That, again, is what we find in the Trade Unions Act of 1872. If it was a criminal act the heading would be: "An Act to amend and relating to the criminal law." I am not going to trouble by further consideration to the scheme and structure of the act, but I do respectfully submit, if this statute was looked at in the ordinary way, to see whether it was a contribution to the criminal law of Canada, apart from the serious questions that arise under section 91 and section 92, could anybody describe this as a criminal statute? Supposing a division was set up between criminal and civil acts, in which column would this statute find its place? That, in my submission, is the answer to Sir John Simon's point, which is a necessary point for his case, if he has to distinguish this case from your Lordships' judgment in the Board of Commerce case.

That, my Lords, leaves me to deal with the point which was so ably argued by my friend Mr. Duncan, that is, that it is the aspect of the Act which has to be looked at. If that is the true view, I suppose it can be said that this is hardly legislation which is not in the Dominion interest, taking all the enumerations of section 92. I suppose from one point of view the Dominion would be interested in having uniform legislation throughout the Dominion, and, therefore, it is insufficient in my submission that the subject matter of the legislation is not confined to one province only, but extends to all the provinces, and, in fact, my learned friend contends that these two sections must be read together, as if somewhere or other in section 91 or in section 92, or by the combined operation of the two sections, there is an express or implied reservation that in all these matters, never mind whether they fall into section 92 or not, the moment they become of Dominion interest they must be treated as being within section 91. May I deal with that? Great importance attaches to the language of section 92.

LORD ATKINSON: A subject of the Dominion has an actual interest in the legislation?

Mr. STUART BEVAN: Certainly.

LORD DUNEDIN: Does not it become a pure question of degree?

Mr. STUART BEVAN: I submit we get assistance from the terms of section 92. It provides: "That the provincial legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated."

LORD WRENBURY: Each is expressed to be exclusive of the other?

Mr. STUART BEVAN: Yes, I do not attach too much importance to that.

VISCOUNT HALDANE: That was the origin of the doctrine of aspects.



MR. STUART BEVAN: Yes. One of the enumerations in section 92 in express terms recognises that the conduct of local works and undertakings or the regulation of local works and undertakings may be of Dominion-wide interest, and in that case express provision is made. I am referring to head 10 of section 92, which seems to throw some light upon the intention of the legislature. Among matters exclusively given to the provinces is head 10 of section 92: "Local works and undertakings other than such as are of the following classes: (A) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the provinces; (B) Lines of steam ships between the province and any British or foreign country; (C) Such works"—here is the Dominion-wide interest expressly provided for—"as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces." It is only in the case of local works and undertakings that in certain circumstances the right is given to the Dominion Parliament to take them out of section 91. I pray that in aid, because in no other case is that right given to the Dominion Parliament, and the legislature, in the case of local works and undertakings, transport, railways and steam ships, recognises that, though primarily they are of local interest, and are local works and undertakings that should be assigned to the province, nevertheless they may have assumed such an importance from a Dominion point of view that they are to be taken out of section 92 and treated as if they were in section 91. I rather gathered from your Lordship that it might be said that the fact of finding the exceptions under head 10 was partly against my submission or idea of it.

LORD WRENBURY: It is another indication that the Dominion Parliament is, as between the two, the greater; they are mutually exclusive.

MR. STUART BEVAN: Yes, but when one finds one in a particular enumeration out of sixteen the event of the topic becoming one of Dominion-wide importance, being recognised, you do not find such a recognition under any other heads. That, I submit, is material to my statement.

VISCOUNT HALDANE: I think the case discussed in *Hodge v. The Queen* was this. The province had regulated the liquor traffic by setting up all sorts of subordinate restrictions. It was declared by this board that that was in the exclusive control of the province, notwithstanding what was decided in *Russell v. The Queen*, and when the Dominion went on to try to get rid of this by getting that kind of restriction the provinces said merely in one case it was declared by this board that that was *ultra vires*.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: It is not everything that is good for more than one province; it must be something within the meaning of head 10, where it refers to a work wholly situated within the province, which is declared to be for the general advantage of Canada.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: Supposing they set up in Canada a Cordite Factory to supply ammunition for the whole Dominion, Ottawa might say: That is for the advantage of Canada, or more than one province.

MR. STUART BEVAN: May I take an example nearer home. May I take local electricity works?

VISCOUNT HALDANE: You might set up a generating station for two provinces?

MR. STUART BEVAN: Yes. Clause (C) of head 10 is "Such Works"—that is local works and undertakings, I suppose, of any character—"as, although wholly situate within the province, are before or after their execution declared

by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces."

VISCOUNT HALDANE: Supposing a river was flowing through a province and furnishing a lot of power, and then goes through another province. The river flows through the first province and furnishes generating power, a great deal more than is necessary for the purposes of the province, could not Parliament say: This is a work set up for the benefit of two or three provinces, and we shall declare it so?

MR. STUART BEVAN: Yes. That case is expressly provided for. There is to be a declaration by the Parliament of Canada that it is for the general advantage, and until they do that I submit it is quite clear from section 92 and particularly from the words of head 10 (C), that there is no power to legislate so as to interfere with any of the matters or trench upon any of the matters in section 92. I have admitted, and I have never attempted to argue this case otherwise, that if you find a subject within both enumerations, the Dominion rights prevail. That is why my learned friends have been so anxious to bring in the criminal law, an aspect which had not occurred to me, though I might have dealt with it incidentally, to be the position under section 91. Property and civil rights in the province are liable to be interfered with every day. When one looks at the enumerations of section 91 one sees at once how the industrial sections fall very largely to be dealt with by the Canadian Government. Your Lordships see in section 91 the postal services, banks, criminal law and Dominion railways are all given to the Dominion Parliament, and incidentally they could deal with the labour situation on Dominion Railways or in the shipping trade.

Now, may I go to another branch of the argument. The regulation of labour and the prevention of strikes, even though it involves trenching upon civil rights in the provinces, is one which has become a Dominion-wide matter, which can hardly be supported when one sees what a very wide and effective hand the Dominion Parliament has over all this, owing to the enumerations of section 91. Your Lordships will remember the case of *The Attorney General for Canada v. The Grand Trunk Railway Company*, in 1907 Appeal Cases.

VISCOUNT HALDANE: That was with regard to railways?

MR. STUART BEVAN: Yes, and this is very relevant, I submit, on the question of the Dominion-wide importance of the topic legislated for by the *Lemieux Act*. The whole of the railway labour question falls to be legislated upon by the Dominion Government by virtue of enumeration 10 of section 10, the one I have been dealing with upon another branch of my submission: "Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province". Those are assigned back from section 92 to section 91. Therefore, the whole of the labour situation, as is shown by the contracting out case, which is a decision of your Lordships' Board, and the whole of the legislation with regard to labour unrest falls to be dealt with by the Dominion Government, and yet, when one comes to look at the *Lemieux Act*, at page 12, of the Appendix, it says that employer means any person, and so on, including railways. That is in the Joint Appendix at page 12 under the definition of employer: "Employer means any person, company or corporation employing ten or more persons and owning or operating any mining property, agency of transportation or communication, or public service utility, including, except as hereinafter provided, railways" and so on. That I think is the only part of the act I am not challenging, if it is confined to Dominion railways I am not challenging the right of the Dominion to legislate for Dominion railways with respect of the labour aspect of the railway organization; that they are entitled to do under section 92, 10 (A).



LORD SALVESEN: That would mean you would say this Act would be saved so far as it regarded the Dominion Railways?

Mr. STUART BEVAN: Yes.

LORD SALVESEN: That is, the Railways not operating entirely within one Province?

Mr. STUART BEVAN: Yes, I concede that, but they do not get that because it is criminal legislation; they do not get it because it is trade or commerce, they get it under the express reservation to them of Dominion Railway Legislation, which has been held in 1907 Appeal Cases to deal with such industrial matters as the right of employees to contract out.

Now while one is on sections 91 and 92 there is another matter that was raised in my learned friend Mr. Duncan's argument that I desire to deal with; he drew attention to section 92 and to the last enumeration No. 16 "Generally all matters of a merely local or private nature in the Province", and contended and cited authority to your Lordships for it, that number 16, when regarded with any of the other preceding 15 enumerations, was exclusive, that they were all exclusive the one of the other. I agree with regard to 16 and any one of the numbers from 1 to 16, but from 1 to 16 are not mutually exclusive. 16 would be local matters not precisely dealt with under numbers 1 to 15 but dealing with numbers 1 to 16, and applying the present case my contention is it comes under at least three of those enumerations.

LORD WRENBURY: You say No. 16 ought only to be looked at on the word "Generally"; you may say we have hitherto detailed specific matters, now we add "generally".

VISCOUNT HALDANE: Yes, not restricted but sweeping up.

Mr. STUART BEVAN: I cannot say, taking the one we have heard so much of in this case "property and civil rights within the Province", I can bring myself under that and also 16, because 16 refers to matters not specifically dealt with in numbers 1 to 15.

LORD ATKINSON: It sweeps up.

Mr. STUART BEVAN: It sweeps up. It does not prevent me from presenting my case that I come under section 92 either under 8 or 10 or 13, or under all three of them; that is my submission, that I come under all three of them, that it is not only an interference with property and civil rights in the province, but it is an interference with Municipal Institutions in the Province, and local works and undertakings.

VISCOUNT HALDANE: I think "the imposition of punishment by fine, penalty or imprisonment" for infraction of a Provincial law.

Mr. STUART BEVAN: Yes, I am obliged, that is No. 15 as well. Having submitted that point I am really indifferent as to what head I come under as long as I find somewhere in Section 92 an umbrella. I have perhaps put No. 13 more to the forefront than I ought, but I venture to submit it is very important. Any one of them is equally important. Here was a Municipal Institution.

LORD ATKINSON: It is a local undertaking.

Mr. STUART BEVAN: It is a local undertaking which is outside the class of those local undertakings which by that exception in enumeration 10 are thrown back into section 91.

LORD SALVESEN: Not dealing with a Municipal Institution as such.

Mr. STUART BEVAN: I am dealing with that quite shortly. Here we are a Municipal Institution carrying on this work; The Municipal Institution is the creation of the Provincial Legislature. Is it to be said in a case like that, all the Provincial Legislature can do is to create the Municipal Institution, but that the rights and obligations and powers of the Municipal Institution, the creation

of the Provincial Legislature, are to be determined by Dominion Legislation? I submit not. When the creation of Municipal Institutions is given to the Provincial Legislature surely the powers and rights of the Institution are to be defined by the Legislature that creates them. It is an impossible sort of thing that one Legislature should create an Institution and another Legislature should say what powers that Institution should have, and my submission is that I come here within "Municipal Institutions".

LORD SALVESEN: The powers that are interfered with here, you say, are those that flow from the Common Law Statute from the creation of this Institution as a Municipal one?

MR. STUART BEVAN: The powers as to the Municipal Institution are with reference to the terms of employment of their workmen, among other things: they have power to employ workmen, and, I submit power to decide what they will pay the workmen and the conditions of employment as between themselves and those workmen; that is a civil right; it is a right that every citizen has, and a right that every Municipal Institution has.

LORD SALVESEN: How are they different from any ordinary employer in this respect?

MR. STUART BEVAN: They could not do anything that is contrary to the Criminal Law; that I should not suggest for a moment; but when the Provincial Legislature has the right to create the Municipal Institution it has the right to say what that Municipal Institution shall do, and the means by which it shall do it as long as there is an enforcement of any provision of any Criminal statute.

VISCOUNT HALDANE: It looks as if the Dominion Legislature legislating here had assumed that the employers might lock out and the workman might strike, and they said, if we set up this Board we impose a restriction as to title to lock out which is to become operative under certain conditions.

MR. STUART BEVAN: They might just as well say, if this legislation is open to the Dominion Legislature, there is great industrial unrest, or always a chance of great industrial unrest, and we think things will be much easier if no one was to be employed for more than 6 hours a day, it would tend to relieve the position and everything would go much more smoothly; that, in my submission, would be an invasion of civil rights.

VISCOUNT HALDANE: They may have thought, as was thought at the time of the gas stokers' strike, that the law is obsolete, the general provisions of English Common Law against strikes and combinations, just as they thought here, that the Act of 1871 had done all that was necessary, and they may have thought it was absolute and just, supposing it was a construction upon the hypothesis that there was not a general right.

MR. STUART BEVAN: I have had an opportunity of looking at it with the assistance of my learned friend Mr. Duncan, and I think he will check me if I am wrong, he takes the view with regard to the question of combination of workmen and employers and whether they are legal in Canada that I am bound to submit to your Lordships. As far as the limited time at one's disposal for research has gone I have been unable to discover that there is any Canadian enactment reproducing the terms of section 3 of the Trade Unions Act of 1871. Sections 496, 497 and 498 of the Criminal Code would seem to deal with the matters sufficiently for our purposes to-day, and would seem to establish that before the passing of the Lemieux Act a strike was not illegal.

LORD DUNEDIN: It might be said to your comfort, there was a strong body of opinion that at common law a combination was not indictable as for a conspiracy, if it did not lead to or was not with a view to the breaking of contracts, and that was the prevailing view taken in the case of *Allen v. Flood*.



MR. STUART BEVAN: Yes.

LORD DUNEDIN: It is possible your Canadian lawyers may have taken that view.

MR. STUART BEVAN: I am very much obliged to your Lordship for that reminder; I had forgotten it for a moment. I really think the Code carries it further, because section 498 deals with penalties for conspiracy. May I read the section in full, because this is important. I wish to establish, if I can, that at the date of the passing of the Lemieux Act, a strike was a lawful thing, and it is not only by certain provisions of the Lemieux Act that a strike is a lawful thing.

LORD ATKINSON: You have a better title than the legality now.

MR. STUART BEVAN: A better title than the Lemieux Act. Section 498 says: "Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat or transportation company,—(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or (b) to restrain or injure trade or commerce in relation to any such article or commodity; or, (c), to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or, (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property. 2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees". Now reading that with (b), which creates or makes it a criminal offence to restrain or injure trade or commerce in relation to any such article or commodity, one finds that, even where trade or commerce is restrained or injured, the section shall not be applicable to combinations of workmen or employees restraining or injuring trade or commerce, for their own reasonable protection as such workmen or employees. I think the only difference in the result is that it must be done reasonably.

VISCOUNT HALDANE: It is not affirmative, it is not repealing any existing law, but you say it is only a Code and it recognizes what may be done.

MR. STUART BEVAN: Yes. My submission is that, having regard to section 498, subsection 2, "Nothing in this section shall be construed to apply," a prosecution for conspiracy or striking of workmen must necessarily fail and they could not be convicted; something must turn on whether there was reasonable protection affecting the position. It is not if they had reasonable ground for supposing it is for their protection, but for their own reasonable protection.

LORD DUNEDIN: I am not inclined to agree with you there. It seems to me the subsection only means you shall not bring a prosecution under this section if the subsection applies, and, therefore, you have got to go the whole length of saying that no prosecution for conspiracy here, apart from the common law, could ever be brought unless you brought it within the provisions of the section.

MR. STUART BEVAN: Section 498.

LORD DUNEDIN: That I do not follow. It seems to me you might have prosecutions quite apart from that. The provisions of the section necessarily create a new offence. Suppose the first part of the section had never been passed

at all. You have to say no such thing as a prosecution for criminal conspiracy would ever be possible at all; that I cannot follow.

MR. STUART BEVAN: I appreciate your Lordship's criticism.

LORD ATKINSON: In this Code you have a number of these things dealt with, and then the workmen are exempted if they have reasonable excuse.

MR. STUART BEVAN: I am obliged. Your Lordship will observe this, that if a prosecution were instituted against strikers for conspiracy, they would be charged with conspiring to injure trade or commerce in relation to certain articles or commodities.

LORD ATKINSON: If they said: The wages are too low, we want an increase, and if we do not get it we will do the particular thing—our wages are low and we strike in order to get an increase—

MR. STUART BEVAN: We stop the output of a certain commodity which injures commerce in that commodity. It is recognized in the evidence that the effect of the occurrence of a strike is to diminish trade and commerce, it does not need evidence to show that—so that it would be very difficult, I respectfully submit, to suggest a plainer case of workmen striking for increase of wages with the result that the manufacturer of a particular commodity was interfered with, and it would be impossible, I submit, to obtain a conviction under the Criminal Act against those workmen for striking.

LORD ATKINSON: Does the Code say anything as to no offence save those dealt with?

MR. STUART BEVAN: No; section 10 of the Code says: "The criminal law of England, as it existed on the seventeenth day of September, one thousand seven hundred and ninety-two, in so far as it has not been repealed by any Act of Parliament of the United Kingdom having force of law in the province of Ontario, or by any Act of Parliament of the late province of Upper Canada, or of the province of Canada, still having force of law, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Act, shall be the criminal law of the province of Ontario." So that the English common law, which of course would govern the position in the year 1792, as affected by section 498 of the Code, would be the law relating to conspiracies at the date of the passing of the Lemieux Act in Canada.

LORD ATKINSON: There is a very awkward consequence under that; if a Statute was passed in England altering the common law in any respect, then do you say this Act would extend the unaltered common law to Canada or the common law altered by statute?

MR. STUART BEVAN: The unaltered law. The only statute to alter the common law would be an Act of Parliament of the United Kingdom having the force of law in Canada.

LORD ATKINSON: That must be so. It looks very much as if in section 498 (2) the Legislature thought that workmen might combine for any ordinary purpose.

MR. STUART BEVAN: Yes, and that seems to be recognized by the language of the Lemieux Act, not enacting it for the first time, but recognizing the effect of section 498, and section 498 contemplated the English common law as it stood in 1792.

LORD ATKINSON: If they did injure trade or commerce provided they had reasonable excuse, that is not a criminal offence.

MR. STUART BEVAN: For their own reasonable protection; that is very wide. That, as I say, seems to have been recognized by the framers of the Lemieux Act, and if strikes were illegal in Canada, contrary to my submission, on the effect of section 498, it is a little difficult to understand the provisions



of the Lemieux Act, they would be quite unnecessary; if they were illegal they would not be stopped by a Board of Conciliation and an inquiry, and by a Report at the end of the Inquiry, upon the issue of which the strike may be resumed if in fact a strike was illegal. It is on this ground, I submit, that before the Lemieux Act came into operation that was so; there was the Act passed in 1892, long before the passing of the Lemieux Act.

LORD ATKINSON: These particular provisions are reproduced from an Act passed in 1892.

MR. STUART BEVAN: I am obliged. With regard to the evidence, my friend Mr. Duncan referred your Lordships to certain passages in the evidence, but I am not going to deal with it at any length. There are one or two things I should like to draw attention to in the cross-examination of the Minister of Labour, Mr. Murdock. His cross-examination begins on page 92. Your Lordships will remember that one of the justifications sought for by the Respondents for the passing of this Act was the fact that, at the time the particular Board in this case was applied for, the Canadian militia were busily occupied in another province in regard to a strike there, steel workers who are not within the Act, and that is the explanation why one of the enumerations that they claim to come under in section 91 is No. 7: "Militia, military and naval service and defence." At first sight that seems rather remote from the topic under discussion, but my learned friend relied on that position, that it was necessary for I suppose the proper disposal of the militia at this crisis that the Board should be granted. Mr. Murdock is cross-examined on page 92 at line 40. This goes to emergency as well: "Have you found in the City of Toronto Labour Unions unreasonable or revolutionary? (A) I lived here for about 20 years, and observed them to be about as intelligent and law-abiding and steady as can be found anywhere. (Q) It would take a good deal to move them from their usual conduct? (A) It would take a real reason. (Q) The Nova Scotia strike itself was in the end settled without bloodshed, was it not? (A) I think so. (Q) And the coal miners there returned to their duties in obedience to their contract under the direction of their leaders? (A) Yes. (Q) And in Drumheller did you have any serious revolutions? (A) No. They went back to work in a couple of days on the instructions of Mr. Sherman and other officers. (Q) You had no special fear for Toronto on account of those two strikes? (A) There was no undue or serious alarm, as may have been indicated at any time. (Q) In Toronto or in Ontario? (A) No." He is asked about the available forces. He is asked: "(Q) Do you think if the militia did not turn out when ordered that we have not enough police to make them turn out? (A) You might have. (Q) The police in Toronto can keep order under all ordinary conditions? (A) Very effectively, I understand. (Q) And there are Provincial Police, as well. (A) Yes. (Q) And any wrongful acts would be promptly suppressed? (A) They would, I hope, be taken care of. (Q) And you think they would be taken care of? (A) Yes, I think so. (Q) Do you give the existence of a strike in Nova Scotia and Drumheller as the reason for giving this order for a Board of Conciliation that you would not otherwise have made? (A) Not altogether; I have only mentioned that as a part of the conditions that existed at the time. (Q) But those were present at the time, and actuated you in giving the order? (A) I had to have in mind all these matters. (Q) You did have them in mind? (A) Yes. (Q) But you say those were not your only reasons? (A) No." Then my Lords there is the question as to whether a strike was threatened at the time the Board was applied for, and on page 96 the Minister of Labour is asked about a telegram to Mr. Gunn who was the spokesman of the Union, the Plaintiffs' witness, sent him on June 29. Now June 29 was seven days after the application for the Board. The application was dated the 22nd. Your Lordship remembers section 15 of the Act, to which Mr. Clauson

drew attention, provided for a statutory declaration that a strike was probable, and that a Board would probably avert the threatened strike, and here Mr. Gunn puts the position quite plainly in his telegram to the Minister of Labour on page 96, line 25: "The Minister of Labour, Ottawa, Ontario"—it is dated June 29, 1923—"Toronto Hydro Electric operating officials using coercion on men to get them to say if they will go on strike Saturday. No strike as yet been threatened by men. Men feel that coercion is an attempt to make them drop application for Board. Please take up with Hydro Commission and see if action can be stopped." That shows that the position was not critical at this time, if seven days after the Board was applied for they did that. My friend says he thinks, I do not so read it, that has reference to another strike. I am not sure about that, it says: "Toronto Hydro Electric operating officials using coercion on men to get them to say if they will go on strike Saturday. No strike as yet been threatened by men." That is the passage I rely on, and I submit is sufficient for my purpose to say, it does not indicate that the national position in Toronto at that date seven days after the Board was applied for, was acute. On page 60 at line 20 the learned trial judge says: "He"—that is the witness, Gunn—"said they agreed that rather than offend public opinion at the time they would not strike." It does not look as if there was any case of emergency made out.

LORD ATKINSON: I suppose most people admit the Canadian system such as it set up would be perhaps more convenient and more effective, but that is an entirely different thing from saying that the respective provinces could not on their own behalf set up a system which would be adequate.

Mr. ST. ART BEVAN: Yes, and there is a great deal to be said for the preference—that is not dealing with sections 91 and 92, but as a matter of business of the provinces interested; I should have thought there would be a good deal to be said for the provincial legislature, which would be in touch with provincial feeling, and have their hand on the pulse of things, being better able to deal with the matter.

VISCOUNT HALDANE: In all those labour disputes the stopping of a strike depends a good deal on whether the Minister can get alongside the men, and whether he knows them, and can talk to them as familiar friends; you have a better chance of that if you are all local than if you are spread over a huge Dominion?

Mr. STUART BEVAN: Yes.

VISCOUNT HALDANE: After all, Canada is more than 3,000 miles from one side to the other, and it is not very easy for a labour minister to be in touch with everybody.

Mr. STUART BEVAN: No, my Lord, and, of course, we do find that the Government of Ontario has passed similar legislation, and is alive to the position, and intended to deal with it. A good deal of criticism has been levelled at the Government of Ontario.

VISCOUNT HALDANE: They apparently omitted the fine provision possibly purposely. It has been a question whether that should be enforced, and I understand in Canada it has been enforced very little.

Mr. STUART BEVAN: One apprehends, if one may surmise, the reason why the provision of the Ontario Act has not been invoked is because there has been this other statute, the Dominion statute, and as a matter of convenience if the Dominion is operating one statute the province cannot very well operate another, and that may be the reason why one of the other provinces who had some industrial disputes act either did not renew it—it was passed to operate for a certain time—or repealed it, I do not know which it was; that may be the practical reason not affecting in the least in my submission the position to-day



as to whether the statute is *intra vires* the Dominion Parliament, or *ultra vires* the Dominion Parliament. That brings me to the last matter I desire to deal with. In my submission the complete answer to the respondents argument is afforded by the judgment in the *Board of Commerce* case. Your Lordships will remember how the points here were raised there, "trade and commerce", "criminal law", not in the aspect in which Sir John Simon presents it, I have dealt with that; the reason for the new aspect is, I submit, afforded by the exigencies of the case created by the *Board of Commerce* case decision; "trade and commerce", "criminal law", "national emergency", which in my submission is only another way of putting Dominion-wide importance. In that case if Dominion-wide importance is to be given effect to, and the aspect of the legislation has to be looked at, one would have thought there would, at any rate, have been a good deal more to be said for the point than in the present case. Each province here is fully capable of dealing with its industrial situation. I am leaving out of account what must be the position if a national crisis arises, emergency legislation, but in this legislation which is directed to all sorts and conditions in the specified industries which is not to apply to meet a particular emergency but to apply for all time, or at any rate till the statute is repealed, it is very difficult to see that there was even as much Dominion-wide interest as in the *Board of Commerce* case, the profiteering case. One can see it there if Dominion-wide interest is the test, because the food-producing provinces would probably be more reluctant to legislate against the abuse which was aimed at than the food-consuming provinces, and it might have been said with more force there than possibly here: Oh, provincial legislation would not avail, the thing has passed such dimensions that the Dominion has had to legislate; what would have been the good of three or four provincial legislatures dealing with the food problem when in the food-producing provinces the legislation set up ignored the critical situation of the country altogether; I do not say it would be correct; I submit it would not have been at all, but there is a good deal more to be said for Dominion legislation in such a case as that if the legislation of different provinces would be different, than there is to be said here, where the interest of all the provinces in industrial disputes would be the same, namely, to allay them by such sedatives as there were easily available. In my submission, putting aside the question of criminal law in the wide aspect which I have dealt with, and, I hope, satisfied your Lordships can have no application here, this case is, I submit, concluded by the *Board of Commerce* case.

VISCOUNT HALDANE: Their Lordships will take time to consider the advice they will humbly tender to His Majesty.

## X.—CONSTITUTIONALITY OF INDUSTRIAL DISPUTES INVESTIGATION ACT UPHELD BY COURTS OF THE PROVINCE OF QUEBEC IN 1912-1913

Legal proceedings involving the constitutionality of the Industrial Disputes Investigation Act were instituted in 1911 in the courts of the province of Quebec, the case being heard by Mr. Justice Lafontaine, of the Superior Court of Quebec, and, upon appeal, by the Court of Review of the Montreal District, the judgment in each case upholding the validity of the statute. Following is a brief statement of the preliminary circumstances of the case and the texts of the various court judgments.

An application was made in June, 1911, by the employees of the Montreal Street Railway Company for the establishment by the Minister of Labour of a Board of Conciliation and Investigation to deal with a dispute relative to alleged dismissals and discrimination on the part of the company against members of the street railway employees' union. The application being held to meet the requirements of the statute to a reasonable degree, a Board of Conciliation and Investigation was established in due course, constituted as follows: the Honourable Mr. Justice Fortin, of Montreal, Que., Chairman; Mr. J. L. Perron, K.C., barrister, of Montreal, Que., appointed on the recommendation of the employer, and Mr. Charlemagne Rodier, barrister, of Montreal, Que., appointed on the recommendation of the employees.

On August 15, as the board was about to commence its inquiry, the chairman was served with a petition for a writ of injunction asking that proceedings before the board should be forbidden by the courts as being *ultra vires*, the petition in question being presented on behalf of the Montreal Street Railway Company. The board refrained from proceeding with the inquiry and the Department of Justice was requested by the Minister of Labour to guard the interests of the department in the matter. On October 27 the chairman of the board was served with a copy of a judgment of the Honourable Mr. Justice Charbonneau, of the Superior Court, Montreal, authorizing the granting of a writ of prohibition against further procedure by the Board until final judgment had been rendered on points raised in its petition by the Montreal Street Railway Company, which, among other things, questioned the constitutionality of the Industrial Disputes Investigation Act, 1907, under which the board had been established.

### MR. JUSTICE CHARBONNEAU'S DECISION

The text of Mr. Justice Charbonneau's judgment was as follows:—

The court, after hearing the parties on the motion asking that a Writ of Prohibition be issued against the defendant board to prevent it from proceeding in the above mentioned matter;

Considering that, among other means invoked by the applicant in support of its request, it is alleged that the Industrial Disputes Act, 1907, is unconstitutional, and not within the power of the Parliament which passed it;

Considering that, in spite of the opinion of this court being against the claim put up by said applicant on that point, it is in the interest of justice that this matter be further argued;

Allows the issuance of the writ asked for, and declares that the *statu quo* order granted on August 15, 1911, by the Honourable Mr. Justice Pagnuelo, and since continued, remains in force until final judgment.

### JUDGMENT BY SUPERIOR COURT OF QUEBEC

On November 11, 1912, judgment was given by Mr. Justice Lafontaine, of the Superior Court on the further aspects of the case stated in Mr. Justice



Charbonneau's decision. This judgment was rendered by Mr. Justice Lafontaine in the following terms:—

*The Montreal Street Railway Company, Plaintiff, vs. the Board of Conciliation and Investigation et al, Defendant, and the Hon. T. W. Crothers, Co-Respondent.*

The court, after hearing the parties through their counsel, as well as their witnesses, on the merits of this case: after examining the procedure and exhibits produced, and after deliberating;

Whereas, the plaintiff asks for a "Prohibition Order" against the Board of Conciliation and Investigation composed of the Honourable Mr. Justice Fortin, Mr. Charlemagne Rodier and Mr. Joseph Léonide Perron, both barristers of the city of Montreal, appointed under the Industrial Disputes Investigation Act, 1907, to inquire into a dispute between said company and several of its employees, and against Valérie Langevin and J. A. Blouin, the applicants, who have asked for the appointment of said board, giving as their ground the following two causes, to wit:—

1. That the said Industrial Disputes Investigation Act, 1907, passed by the Federal Government is unconstitutional, as the object matter of said Act is exclusively under the jurisdiction of the legislature of this province;

2. That the forms prescribed for the appointment of said board have not been complied with, and the decision of the minister appointing said board is irregular and illegal.

A third ground, to wit: That the said Act does not apply in this case, and that the law that might apply was the Conciliation and Labour Act, concerning disputes relating to work on railroads, having been renounced at the hearing.

Whereas, the co-respondent, the Honourable the Minister of Labour, has answered with a plea which is a denial of the statement of action, and specially adds that the Board of Conciliation and Investigation not being an inferior court subject to the supervision orders and control of the Superior Court, there is no cause for a "Prohibition Order" being issued in this case;

Whereas, the defendants, Blouin and Langevin, also put in a plea similar to the one put in by the co-respondent, the other defendants, members of said Board of Conciliation and Investigation, have made default and the other defendants have made default;

Whereas, the Industrial Disputes Investigation Act, 1907, has for its apparent and ostensible aim the prevention of strikes, which are one of the manifestations, often troubling and irritating, and causing disorder from one end of the country to the other, of a social and economic condition existing throughout the Dominion, to wit: labour and capital; this condition, by its nature, effects and various and multiform manifestations, considerably surpasses the judicial nature and effects of relations between employers and employees resulting from the contract for the hire of labour; this economic and social condition extends beyond the limits of any locality and province and extends indeed throughout the whole country, and is consequently of a general character, and not of a purely local and private character in the province (subsec. 16 of sec. 92, British North America Act, 1867); the conditions produced by this social and economic fact, which is the subject matter of said law, cannot come under section 92 of the British North America Act or of any of its provisions, and, particularly can be classed neither in the subject-matter mentioned in subsection 13, relating to private property and civil rights in the province, nor in subsection 14, relating to the administration of justice or the creation, maintaining and organization of court in the province, nor in section 16, relating to matters of a purely local or private character in the province; on the contrary, the matter regulated by said Industrial Disputes Investigation

Act is, in a general way, essentially connected with the peace, order and good government of Canada, according to section 91 of said British North America Act, this matter not coming into "the class of subjects exclusively assigned to the provincial legislatures," and so must belong to the Federal Parliament; it matters little whether this subject matter is connected with any of the subsections of section 91 or with the criminal law, or with the regulation of trade and commerce, or with any other sections, the moment this matter does not come under the powers assigned to the provinces by section 92 of said Act, or whether it has a general and almost national importance and, in a general way, is connected with the peace, order and good government of Canada, and as such this matter rightly and necessarily belongs to the Federal Parliament;

Whereas, the conditions and requirements for the appointment of said board have been complied with, and moreover there can be no reason for the court to inquire into the facts which have been the grounds of the decision of the minister who has appointed said Board, whose decision, according to the Act, is final;

Maintains the co-respondent's plea and the plea of the defendants, Langevin and Blouin, and dismisses the request for the issuance and maintaining of said prohibition order, and quashes and annuls said prohibition order, with costs.

(Sgd.) E. LAFONTAINE,  
J. S. C.

#### CONSTITUTIONALITY OF THE ACT FURTHER UPHELD

Mr. Justice Lafontaine's decision having been appealed, the case came before the Superior Court of the Montreal District (In Review) and the judgment of the Court of Review was delivered on June 13, 1913, by the Honourable Justices Tellier, DeLorimier and Greenshields. The judgment upheld the constitutionality of the Industrial Disputes Investigation Act as to the points on which it had been attacked, confirming in this respect the decision of Mr. Justice Lafontaine. The Court of Review, however, reversed Mr. Justice Lafontaine's action with respect to the writ of prohibition against the Board of Conciliation and Investigation, it being held that at the time of the application for a board no dispute within the meaning of the Act existed between the company and its employees, the board being therefore ordered to abstain from any procedure. The full text of the judgment of the Court of Review is as follows:—

Province of Quebec,

District of Montreal.

#### SUPERIOR COURT

(In Review)

The thirteenth day of June, one thousand nine hundred and thirteen.

Present: The Hon. Mr. Justice Tellier, The Hon. Mr. Justice DeLorimier, The Hon. Mr. Justice Greenshields.

Montreal Street Railway Company, petitioner, vs. the Board of Conciliation and Investigation, respondent, and Hon. T. W. Crothers, *et al*, mis-en-cause.

The court, having heard the parties by their respective counsel, upon the demand of petitioner for revision of the judgment rendered in the Superior Court, in and for the District of Montreal, on the eleventh day of November one thousand nine hundred and twelve; having examined the record and proceedings had in this case, and maturely deliberated;

Considering that the statute 6-7 Edward VII, chapter 20, as amended by 10-11 Edward VII, chapter 29, being an Act to Aid in the Prevention and Set-



tlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities, and known as "The Industrial Disputes Investigation Act, 1907," is constitutional and *intra vires* of the Dominion Parliament, and its enactment is within the legislative powers of the Dominion Parliament;

Considering that the petitioner, the Montreal Street Railway Company, is subject to all the terms and provisions of said Act;

Considering that, at the time of the application for the appointment of a Board of Conciliation and Investigation in this case made, no dispute, within the purview or meaning of the Act, existed between the petitioner, the Montreal Street Railway Company, and any person or persons between whom and it existed the relationship of employee or employees and employer;

Considering that the proof in this case made, establishes that on the date of the appointment of the said Board of Conciliation and Investigation, and on the dates when the said board proposed to proceed with its investigation, there existed no subject-matter over which the said Board of Conciliation and Investigation, or its members, had or could exercise any jurisdiction;

Considering that the said Board of Conciliation and Investigation, and the members thereof, after the appointment made by the Honourable Minister of Labour, were subject to the superintending and reforming power, order and control of the Superior Court of the province of Quebec, and of the judges thereof, in such manner and form as by law provided;

Considering that a Writ of Prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction;

Considering the petitioner has established in part the material allegations of its demand;

Considering the defence of the respondents and each of them is unfounded;

Considering that there is error in the judgment *a quo*: Doth reverse, annul and quash the said judgment;

Proceeding to render the judgment that should have been rendered by the Court of first instance;

Doth maintain the Writ of Prohibition herein issued: Doth declare the same perpetual: Doth order and enjoin the said Board of Conciliation and Investigation, and each of the members thereof, individually, jointly, and severally, to abstain from proceeding or acting as such board in the investigation and conciliation of the alleged dispute referred to in the application to the Honourable Minister of Labour of the Dominion of Canada, there being no dispute or industrial dispute falling within the purview of the said Act which could form the subject-matter of investigation or conciliation by said board, and in consequence the said board and the members thereof, is, and are, without jurisdiction: Doth condemn the mis-en-cause, Valerie Langevin and J. A. Blouin, to the costs as well of the Superior Court as of this court upon the contestation filed by them; and doth recommend that the costs of the contestation filed by the Honourable the Minister of Labour of the Dominion of Canada be paid by the Government of the Dominion of Canada; and it is ordered that the record be remitted to the court below.

(Sgd.) LOUIS TELLIER,

J. C. S.

**APPENDIX A**

**The Industrial Disputes Investigation Act, 1907**

**As amended by 1910, c. 29; 1918, c. 27; and 1920, c. 29**

**AND AN INDEX THERETO**

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**Compiled by the Parliamentary Counsel, House of Commons**

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An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities.

[Assented to 22nd March, 1907.] Chapter 20,

(As amended by 1910, c. 29; 1918, c. 27; and 1920, c. 29.)

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. This Act may be cited as *The Industrial Disputes Investigation Act, 1907*. Short title.

#### PRELIMINARY

##### *Interpretation*

2. In this Act, unless the context otherwise requires—

(a) "Minister" means the Minister of Labour;

"Minister."

(b) "department" means the Department of Labour;

"Department."

(c) "employer" means any person, company or corporation employing ten or more persons and owning or operating any mining property, agency of transportation or communication, or public service utility, including, except as hereinafter provided, railways, whether operated by steam, electricity or other motive power, steamships, telegraph and telephone lines, gas, electric light, water and power works, or any number of such persons, companies or corporations acting together, or who in the opinion of the Minister have interests in common. (Am. 1920, c. 29.)

"Employer."

(d) "employee" means any person employed by an employer to do any skilled or unskilled manual or clerical work for hire or reward in any industry to which this Act applies;

"Employee."

(dd) A lockout or strike shall not, nor, where application for a Board is made within thirty days after the dismissal, shall any dismissal, cause any employee to cease to be an employee, or an employer to cease to be an employer, within the meaning and for the purposes of this Act. (1918, c. 27.)

Employee or employer not to cease to be such for lockout, strike, etc.

(e) "dispute" or "industrial dispute" means any dispute or difference between an employer and one or more of his employees, as to matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such

"Dispute."  
"Industrial dispute."



violation thereof as constitutes an indictable offence); and, without limiting the general nature of the above definition, includes all matters relating to—

- (1) the wages allowance or other remuneration of employees, or the price paid or to be paid in respect of employment;
- (2) the hours of employment, sex, age, qualification or status of employees, and the mode, terms and conditions of employment;
- (3) the employment of children or any person or persons or class of persons, or the dismissal of or refusal to employ any particular person or persons or class of persons;
- (4) claims on the part of an employer or any employee as to whether and, if so, under what circumstances, preference of employment should or should not be given to one class over another of persons being or not being members of labour or other organizations, British subjects or aliens;
- (5) materials supplied and alleged to be bad, unfit or unsuitable, or damage alleged to have been done to work;
- (6) any established custom or usage, either generally or in the particular district affected;
- (7) the interpretation of an agreement or a clause thereof;

"Lockout."

(f) "lockout" (without limiting the nature of its meaning) means a closing of a place of employment or a suspension of work, or a refusal by an employer to continue to employ any number of his employees in consequence of a dispute, done with a view to compelling his employees, or to aid another employer in compelling his employees, to accept terms of employment;

"Strike."

(g) "strike" or "to go on strike" (without limiting the nature of its meaning) means the cessation of work by a body of employees acting in combination, or a concerted refusal or a refusal under a common understanding of any number of employees to continue to work for an employer, in consequence of a dispute, done as a means of compelling their employer, or to aid other employees in compelling their employer, to accept terms of employment;

"Board."

(h) "board" means a Board of Conciliation and Investigation established under the provisions of this Act;

"Applica-  
tion."

(i) "application" means an application for the appointment of a Board under the provisions of this Act;

"Registrar."

(j) "Registrar" means the Registrar of Boards of Conciliation and Investigation under this Act;

"Prescribed."

(k) "prescribed" means prescribed by this Act, or by any rules or regulations made thereunder;

"Trade  
Union."

(l) "trade union" or "union" means any organization of employees formed for the purpose of regulating relations between employers and employees.

*Administration*

3. The Minister of Labour shall have the general administration of this Act.

Minister of  
Labour to  
administer  
Act.

4. The Governor in Council shall appoint a Registrar of Boards of Conciliation and Investigation, who shall have the powers and perform the duties prescribed.

Registrar.

2. The Office of Registrar may be held either separately or in conjunction with any other office in the public service, and in the latter case the Registrar may, if the Governor in Council thinks fit, be appointed, not by name, but by reference to such other office, whereupon the person who for the time being holds such office, or performs its duties, shall by virtue thereof be the Registrar.

## BOARDS OF CONCILIATION AND INVESTIGATION

*Constitution of Boards*

5. Wherever any dispute exists between an employer and any of his employees, and the parties thereto are unable to adjust it, either of the parties to the dispute may make application to the Minister for the appointment of a Board of Conciliation and Investigation, to which Board the dispute may be referred under the provisions of this Act: Provided, however, that in the case of a dispute between a railway company and its employees, such dispute may be referred, for the purpose of conciliation and investigation, under the provisions concerning railway disputes in the Conciliation and Labour Act.

Reference of  
disputes to  
Boards of  
Conciliation  
and Investi-  
gation.

6. (1) Whenever, under this Act, an application is made in due form for the appointment of a Board of Conciliation and Investigation, the Minister shall, within fifteen days from the date at which the application is received, establish such Board under his hand and seal of office, if satisfied that the provisions of this Act apply.

Minister to  
appoint  
Boards on  
application.

(2) The decision of the Minister as to the granting or refusal of a Board shall be final, and when a Board is granted by the Minister, it shall be conclusively deemed to be authorized by and to be in accordance with the provisions of this Act, and no order shall be made or process or proceeding had or taken in any court to question the granting or refusal of a Board, or to review, prohibit, or restrain the establishment of such Board or the proceedings thereof. (1918, c. 27.)

Decision of  
Minister  
final and  
lawful  
appointment  
of Board  
not to be  
questioned.

7. Every Board shall consist of three members who shall be appointed by the Minister.

Members  
of Board.

2. Of the three members of the Board one shall be appointed on the recommendation of the employer and one on the recom-



mentation of the employees (the parties to the dispute), and the third on the recommendation of the members so chosen.

Procedure  
for appoint-  
ment of  
members  
of Board.

8. For the purposes of appointment of the members of the Board, the following provisions shall apply:—

1. Each party to the dispute may, at the time of making application or within five days after being requested so to do by the Minister, recommend the name of one person who is willing and ready to act as a member of the Board, and the Minister shall appoint such person a member of the Board.

2. If either of the parties fails or neglects to duly make any recommendation within the said period, or such extension thereof as the Minister, on cause shown, grants, the Minister shall, as soon thereafter as possible, appoint a fit person to be a member of the Board; and such member shall be deemed to be appointed on the recommendation of the said party.

3. The members chosen on the recommendation of the parties may, within five days after their appointment, recommend the name of one person who is willing and ready to act as a third member of the Board, and the Minister shall appoint such person a member of the Board.

4. If the members chosen on the recommendation of the parties fail or neglect to duly make any recommendation within the said period, or such extension thereof as the Minister, on cause shown, grants, the Minister shall, as soon thereafter as possible, appoint a fit person to be a third member of the Board, and such member shall be deemed to be appointed on the recommendation of the two other members of the Board.

5. The third member shall be the Chairman of the Board.

Notification  
to be given  
parties of  
members of  
Board.

9. As soon as possible after the full Board has been appointed by the Minister, the Registrar shall notify the parties of the names of the members of the Board and the chairman thereof, and such notification shall be final and conclusive for all purposes.

Term of  
office until  
report is  
transmitted.

10. Every member of a Board shall hold office from the time of his appointment until the report of the Board is signed and transmitted to the Minister, and for the purposes of subsection two of section twenty-nine of this Act, from the time the Board is reconvened by the Chairman until the report required under such section is transmitted to the Minister. (Am. 1918, c. 27.)

Members not  
to have  
pecuniary  
interest.

11. No person shall act as a member of a Board who has any direct pecuniary interest in the issue of a dispute referred to such Board.

How  
vacancy  
to be filled.

12. Every vacancy in the membership of a Board shall be supplied in the same manner as in the case of the original appointment of every person appointed.

13. Before entering upon the exercise of the functions of their office the members of a Board, including the chairman, shall make oath or affirmation before a justice of the peace, or other person authorized to administer an oath or affirmation, that they will faithfully and impartially perform the duties of their office, and also that, except in the discharge of their duties, they will not disclose to any person any of the evidence or other matter brought before the Board. (Am. 1910, c. 29.)

Oath of office and secrecy.

14. The department may provide the Board with a secretary, stenographer, or such other clerical assistance as to the Minister appears necessary for the efficient carrying out of the provisions of this Act.

Clerical and other assistance.

### *Procedure for Reference of Disputes to Boards*

15. For the purpose of determining the manner in which, and the persons by whom, an application for the appointment of a Board is to be made, the following provisions shall apply:—

Manner in which application to be made.

1. The application shall be made in writing in the prescribed form, and shall be in substance a request to the Minister to appoint a Board to which the existing dispute may be referred under the provisions of this Act.

2. The application shall be accompanied by—

(a) A statement setting forth—

- (1) the parties to the dispute;
- (2) the nature and cause of the dispute, including any claims or demands made by either party upon the other, to which exception is taken;
- (3) an approximate estimate of the number of persons affected or likely to be affected by the dispute;
- (4) the efforts made by the parties themselves to adjust the dispute;

and—

(b) A statutory declaration setting forth that, failing an adjustment of the dispute or a reference thereof by the Minister to a Board, to the best of the knowledge and belief of the declarant a lockout or strike will be declared, and (except where the application is made by an employer in consequence of an intended change in wages or hours proposed by the said employer) that the necessary authority to declare such lockout or strike has been obtained; or where a dispute directly affects employees in more than one province and such employees are members of a trade union having a general committee authorized to carry on negotiations in disputes between employers and employees and so recognized by the employer, a statutory declaration by the chairman or president and by the secretary of such committee setting forth that, failing an adjustment of the dispute or a reference thereof by the Minister to a Board, to the best of the knowledge and belief of the declarants a strike

Statutory declaration to accompany application for appointment of Board.

Declaration by officers of trade union.



will be declared, that the dispute has been the subject of negotiations between the committee and the employer, that all efforts to obtain a satisfactory settlement have failed, and that there is no reasonable hope of securing a settlement by further negotiations. (1910, c. 29.)

3. The application may mention the name of a person who is willing and ready and desires to act as a member of the Board representing the party or parties making the application.

Signatures  
requisite for  
applications  
to refer  
disputes to  
Boards and  
for statutory  
declarations  
accompany-  
ing them.

16. (1) The application and the declaration accompanying it shall be signed, if made—

- (a) by an employer who is an individual, by the employer himself;
- (b) by an employer which is a partnership, firm or association, by a majority of the partners or members;
- (c) by an employer which is an incorporated company or corporation, by some one of its duly authorized managers or by one or more of the principal executive officers;
- (d) by employees who are members of a trade union, by two of its officers authorized in writing by a majority of the union members affected. If such authorization is obtained by a vote taken in whole or in part at a meeting such meeting shall be called on not less than three days' notice and the vote shall be by ballot. Where a dispute directly affects employees in more than one province and such employees are members of a trade union having a general committee authorized to carry on negotiations in disputes between employers and employees, and so recognized by the employer, may be signed by the chairman or president and by the secretary of the said committee;
- (e) by employees some or all of whom are not members of a trade union, by two of their number authorized in writing by a majority of such employees. If such authorization is obtained in whole or in part by a vote at a meeting, such meeting shall be called on not less than three days' notice and the vote shall be by ballot.

Require-  
ments when  
there is more  
than one  
party to  
application.

(2) If more than one employer, or more than one trade union, or the employees of more than one employer, is or are interested, then and in such case the application and declaration shall be signed in the manner aforesaid by or on behalf of each employer or trade union or the employees of each employer so interested, or by or on behalf of a majority of such employers, or trades unions, or of such employees. (1920, c. 29.)

Application  
to be  
transmitted  
by registered  
letter.

17. Every application for the appointment of a Board shall be transmitted by post by registered letter addressed to the Registrar of Boards of Conciliation and Investigation, Depart-

ment of Labour, Ottawa, and the date of the receipt of such registered letter at the department shall be regarded as the date of the receipt of such application.

18. In every case where an application is made for the appointment of a Board the party making application shall, at the time of transmitting it to the Registrar, also transmit by registered letter to the other party to the dispute, or by personal delivery, a copy of the application and of the accompanying statement and declaration.

Party making application to transmit copy to other party to dispute.

19. Upon receipt by either party to a dispute of a copy of the application for the appointment of a Board such party shall, without delay, prepare a statement in reply to the application and transmit it by registered letter, or by personal delivery, to the Registrar and to the party making the application.

Statement in reply to be made and sent to Registrar and to party making application.

20. Copies of applications or statements in reply thereto, to be transmitted to the other party under any of the preceding sections where the other party is—

To whom communications transmitting copies of applications and replies between parties are to be sent.

- (1) an employer, an incorporated company or corporation, shall be sent to the manager or other principal executive officer of the company or corporation;
- (2) an employer other than an incorporated company or corporation, shall be sent to the employer himself or to the employer in the name of the business or firm as commonly known;
- (3) composed of employees, members of a trade union, shall be sent to the president and secretary of such union;
- (4) composed of employees some or all of whom are not members of a trade union,—

(a) Where some of the employees are members of a trade union, shall be sent to the president and secretary of the union as representing the employees belonging to the union; also

(b) Where some of the employees are not members of a trade union and there are no persons authorized to represent such employees, shall be sent to ten of their number;

(c) Where, under paragraph (e) of subsection one of section sixteen, two persons have been authorized to make an application, shall be sent to such two persons. (Am. 1920, c. 29.)

(2) When the other party comprises more than one employer and those employers are members of an association authorized to carry on negotiations in disputes between employers and employees, copies of applications or statements in reply shall be transmitted to the secretary or principal executive officer of such association; when no such association exists copies of the applications or statements in reply shall be transmitted to each employer individually, or by agreement one employer may be

To whom copies of applications and replies are to be sent.

Associations of employers.



designated by the individual employers concerned to receive copies of applications or statements in reply. (1920, c. 29.)

Groups of  
trade unions.

(3) When in any individual industry the other party comprises more than one trade union and the latter are grouped in a council or federation authorized to carry on negotiations between employers or employees, copies of applications or statements in reply shall be transmitted to the president or secretary of such council or federation; when no such council or federation exists, copies of applications or statements in reply shall be transmitted to the president or secretary of each individual union. (Am 1920, c. 29.)

### *Functions, Powers and Procedure of Boards*

Jurisdiction.

At least ten  
employees to  
be affected  
by dispute.

21. Any dispute may be referred to a Board by application in that behalf made in due form by any party thereto; provided that no dispute shall be the subject of reference to a Board under this Act in any case in which the employees affected by the dispute are fewer than ten.

Method of  
referring  
disputes to  
Board.

22. Upon the appointment to the Board the Registrar shall forward to the chairman a copy of the application for the appointment of such Board, and of its accompanying statement and declaration, and of the statement in reply, and the Board shall forthwith proceed to deal with the matters referred to in these documents.

Additional  
matters may  
be referred  
to Board.

(2) Should it at any stage of the proceedings be made to appear to the Minister that it is necessary, in order to deal satisfactorily with the matters in dispute, that some other matter or matters involved in or incidental to those appearing in the application and statement in answer, if any, should also be referred to the Board, the Minister may under his hand and seal of office refer such matters to the Board accordingly. (Am. 1918, c. 27.)

Duties of  
Board.

23. In every case where a dispute is duly referred to a Board it shall be the duty of the Board to endeavour to bring about a settlement of the dispute, and to this end the Board shall, in such manner as it thinks fit, expeditiously and carefully inquire into the dispute and all matters affecting the merits thereof and the right settlement thereof. In the course of such inquiry the Board may make all such suggestions and do all such things as it deems right and proper for inducing the parties to come to a fair and amicable settlement of the dispute, and may adjourn the proceedings for any period the Board thinks reasonable to allow the parties to agree upon terms of settlement.

Where  
settlement  
affected,

24. If a settlement of the dispute is arrived at by the parties during the course of its reference to the Board, a memorandum of the settlement shall be drawn up by the Board and signed

by the parties, and shall, if the parties so agree, be binding as if made a recommendation by the Board under section 62 of this Act, and a copy thereof with a report upon the proceedings shall be forwarded to the Minister.

Memo-  
randum of  
same with  
report to be  
forwarded to  
Minister.

25. If a settlement of the dispute is not arrived at during the course of its reference to the Board, the Board shall make a full report thereon to the Minister, which report shall set forth the various proceedings and steps taken by the Board for the purpose of fully and carefully ascertaining all the facts and circumstances, and shall also set forth such facts and circumstances, and its findings therefrom, including the cause of the dispute and the Board's recommendation for the settlement of the dispute according to the merits and substantial justice of the case.

Where  
settlement  
not effected  
Board to  
make report  
with recom-  
mendations.

26. The Board's recommendation shall deal with each item of the dispute and shall state in plain terms, and avoiding as far as possible all technicalities, what in the Board's opinion ought or ought not to be done by the respective parties concerned. Wherever it appears to the Board expedient so to do, its recommendation shall also state the period during which the proposed settlement should continue in force, and the date from which it should commence.

Form, in  
which recom-  
mendation  
shall be  
made.

27. The Board's report and recommendation shall be made to the Minister in writing, and shall be signed by such of the members as concur therein, and shall be transmitted by the chairman by registered letter to the Registrar as soon as practicable after the reference of the dispute to the Board; and in the same manner a minority report may be made by any dissenting member of the Board.

Report and  
recommenda-  
tion to be  
made to the  
Minister in  
writing.

28. Upon receipt of the Board's report the Minister shall forthwith cause the report to be filed in the office of the Registrar and a copy thereof to be sent free of charge to the parties to the dispute, and to the representative of any newspaper published in Canada who applies therefor, and the Minister may distribute copies of the report, and of any minority report, in such manner as to him seems most desirable as a means of securing a compliance with the Board's recommendation. The Registrar shall, upon application, supply certified copies for a prescribed fee, to persons other than those mentioned in this section.

Filing and  
distribution  
of report.

29. (1) For the information of Parliament and the public, the report and recommendations of the Board, and any minority report, shall, without delay, be published in the *Labour Gazette*, either verbatim or in summary form as the Minister may determine.

Publication  
of reports.



Additional matters upon which Minister may require opinion of Board.

(2) Where any question arises as to the meaning or application of, or as to anything relating to or connected with,—

(a) any recommendation made by the Board, or,

(b) any settlement agreement drawn up by the Board under section twenty-four of this Act,

the Minister, where he deems it expedient, may on the application of either party or of his own motion, request from the chairman of the Board an expression of the Board's opinion upon such question, and the chairman shall upon receipt of such request reconvene the Board, and the Board shall as soon as practicable report to the Minister its opinion upon such question. (1918, c. 27.)

Powers of Board to summon witnesses, compel testimony and produce testimony and production of documents.

30. For the purpose of its inquiry the Board shall have all the powers of summoning before it, and enforcing the attendance of witnesses, of administering oaths, and of requiring witnesses to give evidence on oath or on solemn affirmation (if they are persons entitled to affirm in civil matters) and to produce such books, papers or other documents or things as the Board deems requisite to the full investigation of the matters into which it is inquiring, as is vested in any court of record in civil cases.

2. Any member of the Board may administer an oath, and the Board may accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

Form of summons.

31. The summons shall be in the prescribed form, and may require any person to produce before the Board any books, papers or other documents or things in his possession or under his control in any way relating to the proceedings.

Documents not to be made public.

32. All books, papers and other documents or things produced before the Board, whether voluntarily or in pursuance to summons, may be inspected by the Board, and also by such parties as the Board allows but the information obtained therefrom shall not, except in so far as the Board deems it expedient, be made public, and such parts of the books, papers or other documents as in the opinion of the Board do not relate to the matter at issue may be sealed up.

Parties may be compelled to be witnesses.

33. Any party to the proceedings shall be competent and may be compelled to give evidence as a witness.

Allowance to witnesses.

34. Every person who is summoned and duly attends as a witness shall be entitled to an allowance for expenses according to the scale for the time being in force with respect to witnesses in civil suits in the superior courts in the province where the inquiry is being conducted with a minimum allowance of four dollars per day. (Am. 1920, c. 29.)

35. Where a reference has been made to the Board of a dispute between a railway company and its employees, any witness summoned by the Board in connection with the dispute shall be entitled to free transportation over any railway en route when proceeding to the place of meeting of the Board and thereafter returning to his home, and the Board shall furnish to such witness a proper certificate evidencing his right to such free transportation.

Witnesses in railway disputes to be entitled to free transportation.

36. If any person who has been duly served with such summons and to whom at the same time payment or tender has been made of his reasonable travelling expenses according to the aforesaid scale, fails to duly attend or to duly produce any book, paper or other document or thing as required by his summons, he shall be guilty of an offence and liable to a penalty not exceeding one hundred dollars, unless he shows that there was good and sufficient cause for such failure.

Penalty for failing to obey summons.

37. If, in any proceedings before the Board, any person wilfully insults any member of the Board or wilfully interrupts the proceedings, or without good cause refuses to give evidence, or is guilty in any other manner of any wilful contempt in the face of the Board, any officer of the Board or any constable may take the person offending into custody and remove him from the precincts of the Board, to be detained in custody until the rising of the Board, and the person so offending shall be liable to a penalty not exceeding one hundred dollars.

Contempt of the Board.

38. The Board, or any member thereof, and, on being authorized in writing by the Board, any other person, may, without any other warrant than this Act, at any time, enter any building, mine, mine workings, ship, vessel, factory, workshop, place or premises of any kind, wherein, or in respect of which any industry is carried on or any work is being or has been done or commenced, or any matter or thing is taking place or has taken place, which has been made the subject of a reference to the Board, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any persons in or upon any such building, mine, mine workings, ship, vessel, factory, workshop, place or premises as aforesaid, in respect of or in relation to any matter or thing hereinbefore mentioned, and any person who hinders or obstructs the Board or any such person authorized as aforesaid, in the exercise of any power conferred by this section, shall be guilty of an offence and be liable to a penalty not exceeding one hundred dollars.

View by direction of Board.

Power to interrogate, examination of factories, etc.

Inspection of work.

39. Any party to a reference may be represented before the Board by three or less than three persons designated for the purpose, or by counsel or solicitor where allowed as hereinafter provided.

How parties may be represented before Board

40. Every party appearing by a representative shall be bound by the acts of such representative.

Parties to be bound by acts of representatives.



Counsel or solicitors excluded except by consent of parties and of Board.

41. No counsel or solicitor shall be entitled to appear or be heard before the Board, except with the consent of the parties to the dispute, and notwithstanding such consent the Board may decline to allow counsel or solicitors to appear.

Members of Board to be British subjects.

42. Persons other than British subjects shall not be allowed to act as members of a Board.

Presence of parties.

43. If, without good cause shown, any party to proceedings before the Board fails to attend or to be represented, the Board may proceed as if he had duly attended or had been represented.

Time and place of sittings of Board.

44. The sittings of the Board shall be held at such time and place as are from time to time fixed by the chairman, after consultation with the other members of the Board, and the parties shall be notified by the chairman as to the time and place at which sittings are to be held: Provided that, so far as practicable, the Board shall sit in the locality within which the subject-matter of the proceeding before it arose.

Proceedings to be public unless otherwise determined by Board.

45. The proceedings of the Board shall be conducted in public; provided that at any such proceedings before it, the Board, on its own motion, or on the application of any of the parties, may direct that the proceedings shall be conducted in private and that all persons other than the parties, their representatives, the officers of the Board and the witness under examination shall withdraw.

Majority of Board.

46. The decision of a majority of the members present at a sitting of the Board shall be the decision of the Board, and the findings and recommendations of the majority of its members shall be those of the Board.

Quorum.

47. The presence of the chairman and at least one other member of the Board shall be necessary to constitute a sitting of the Board.

All members of Board to be present. ✓

48. In case of the absence of any one member from a meeting of the Board the other two members shall not proceed, unless it is shown that the third member has been notified of the meeting in ample time to admit of his attendance.

2. If any member of a Board dies, or becomes incapacitated, or refuses or neglects to act, his successor shall be appointed in the manner provided with respect to the original member of the Board.

Trivial matters.

49. The Board may at any time dismiss any matter referred to it which it thinks frivolous or trivial.

50. The Board may, with the consent of the Minister, employ competent experts or assessors to examine the books or official reports of either party, and to advise it upon any technical or other matter material to the investigation, but shall not disclose such reports or the results of such inspection or examination under this section without the consent of both the parties to the dispute.

Employment  
of experts.

### *Remuneration and Expenses of Board*

51. The members of a Board shall be remunerated for their services as follows:—

Remunera-  
tion of  
members  
of Board.

(a) to members other than the chairman, an allowance of five dollars a day for a time not exceeding three days during which the members may be actually engaged in selecting a third member of the Board;

(b) to each member of the Board, including the chairman, an allowance at the rate of twenty dollars for each day's sitting of the Board and for each day necessarily engaged in travelling from or to his place of residence to attend or after attending a meeting of the Board. (1910, c. 29.)

52. No member of the Board shall accept in addition to his salary as a member of the Board any perquisite or gratuity of any kind, from any corporation, association, partnership or individual in any way interested in any matter or thing before or about to be brought before the Board in accordance with the provisions of the Act. The accepting of such perquisite or gratuity by any member of the Board shall be an offence and shall render such member liable to a fine not exceeding one thousand dollars.

Acceptance  
of gratuities  
and  
perquisites  
by members  
an offence.

53. Each member of the Board will be entitled to his actual necessary travelling expenses for each day that he is engaged in travelling from or to his place of residence for the purpose of attending or after having attended a meeting of the Board.

Actual  
necessary  
travelling  
expenses of  
members  
allowed.

54. All expenses of the Board, including expenses for transportation incurred by the members thereof or by persons under its order in making investigations under this Act, salaries of employees and agents, and fees and mileage to witnesses shall be allowed and paid upon the presentation of itemized vouchers therefor, approved by the chairman of the Board, which vouchers shall be forwarded by the chairman to the Minister. The chairman shall also forward to the Minister a certified and detailed statement of the sittings of the Board, and of the members present at such sittings.

Payment of  
expenses  
of Board.

### DUTIES OF THE REGISTRAR

55. It shall be the duty of the Registrar:—

(a) to receive and register, and, subject to the provisions of this Act, to deal with all applications by employers or employees

To receive  
and deal  
with  
applications.



for a reference of any dispute to a Board, and to at once bring to the Minister's attention every such application;

Assist in constituting Boards.

(b) to conduct such correspondence with the parties and members of Boards as may be necessary to constitute any Board as speedily as possible in accordance with the provisions of this Act;

Assist in giving effect to recommendations of Boards.

(c) to receive and file all reports and recommendations of Boards, and conduct such correspondence and do such things as may assist in rendering effective the recommendations of the Boards, in accordance with the provisions of this Act;

Register particulars of proceedings before Boards and safeguard all documents relating to proceedings.

(d) to keep a register in which shall be entered the particulars of all applications, references, reports and recommendations relating to the appointment of a Board, and its proceedings; and to safely keep all applications, statements, reports recommendations and other documents relating to proceedings before the Board, and, when so required, transmit all or any of such to the Minister;

Supply information and necessary forms relating to proceedings before Boards.

(e) to supply to any parties, on request, information as to this Act, or any regulations or proceedings thereunder, and also to furnish parties to a dispute and members of the Board with necessary blank forms, forms of summons or other papers or documents required in connection with the effective carrying out of the provisions of this Act;

Generally.

(f) generally, to do all such things and take all such proceedings as may be required in the performance of his duties prescribed under this Act or any regulations thereunder.

#### STRIKES AND LOCKOUTS PRIOR TO AND PENDING A REFERENCE TO A BOARD ILLEGAL

Prohibition of strikes or lockouts prior to or pending reference to Board.

56. It shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labour Act: Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lock-out or strike: Provided also that, except where the parties have entered into an agreement under section 62 of this Act, nothing in this Act shall be held to restrain any employer from declaring a lockout, or any employee from going on strike in respect of any dispute which has been duly referred to a Board and which has been dealt with under section 24 or 25 of this Act, or in respect of any dispute which has been the subject of a reference under the provisions concerning railway disputes in the Conciliation and Labour Act.

57. Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours; and in the event of such intended change resulting in a dispute, until the dispute has been finally dealt with by a Board, and a copy of its report has been delivered through the Registrar to both the parties affected, neither of those parties shall alter the conditions of employment with respect to wages or hours, or on account of the dispute do or be concerned in doing, directly or indirectly, anything in the nature of a lockout or strike, or a suspension or discontinuance of employment or work, but the relationship of employer and employee shall continue uninterrupted by the dispute, or anything arising out of the dispute; but if, in the opinion of the Board, either party uses this or any other provision of this Act for the purpose of unjustly maintaining a given condition of affairs through delay, and the Board so reports to the Minister, such party shall be guilty of an offence, and liable to the same penalties as are imposed for a violation of the next preceding section. (Am. 1920, c. 29.)

Relation of parties to remain unaltered pending proceedings before a Board, and delivery of report.

58. Any employer declaring or causing a lockout contrary to the provisions of this Act shall be liable to a fine of not less than one hundred dollars, nor more than one thousand dollars for each day or part of a day that such lockout exists.

Penalty for causing lockout.

59. Any employee who goes on strike contrary to the provisions of this Act shall be liable to a fine of not less than ten dollars nor more than fifty dollars, for each day or part of a day that such employee is on strike.

Penalty for going on strike.

60. Any person who incites, encourages or aids in any manner any employer to declare or continue a lockout, or any employee to go or continue on strike contrary to the provisions of this Act, shall be guilty of an offence and liable to a fine of not less than fifty dollars nor more than one thousand dollars.

Penalty for inciting to lockout or strike.

61. The procedure for enforcing penalties imposed or authorized to be imposed by this Act shall be that prescribed by Part XV of *The Criminal Code* relating to summary convictions.

Procedure for enforcing penalties.

#### SPECIAL PROVISIONS

62. Either party to a dispute which may be referred under this Act to a Board may agree in writing, at any time before or after the Board has made its report and recommendation, to be bound by the recommendation of the Board in the same manner as parties are bound upon an award made pursuant to a reference to arbitration on the order of a court of record; every agreement so to be bound made by one party shall be forwarded to the Registrar who shall communicate it to the

Recommendation of a Board binding in certain cases.



other party, and if the other party agrees in like manner to be bound by the recommendation of the Board, then the recommendation shall be made a rule of the said court on the application of either party and shall be enforceable in like manner.

Application of provisions of this Act to any dispute on joint application of parties.

63. In the event of a dispute arising in any industry or trade other than such as may be included under the provisions of this Act, and such dispute threatens to result in a lockout or strike, or has actually resulted in a lockout or strike, either of the parties may agree in writing to allow such dispute to be referred to a Board of Conciliation and Investigation, to be constituted under the provisions of this Act.

2. Every agreement to allow such reference shall be forwarded to the Registrar, who shall communicate it to the other party, and if such other party agrees in like manner to allow the dispute to be referred to a Board, the dispute may be so referred as if the industry or trade and the parties were included within the provisions of this Act.

3. From the time that the parties have been notified in writing by the Registrar that in consequence of their mutual agreement to refer the dispute to a Board under the provisions of this Act, the Minister has decided to refer such dispute, the lockout or strike, if in existence, shall forthwith cease, and the provisions of this Act shall bind the parties.

Minister may in certain cases with or without application order a Board or recommend an inquiry.

63A. Where in any industry any strike or lockout has occurred or seems to the Minister to be imminent and, in the public interest or for any other reason it seems to the Minister expedient, the Minister, on the application of any municipality interested, or of the mayor, reeve, or other head officer or acting head officer thereof, or of his own motion, may, without application of either of the parties to the dispute, strike or lockout, whether it involves one or more employers or employees in the employ of one or more employers, constitute a Board of Conciliation and Investigation under this Act in respect of any dispute, or strike or lockout, or may in any such case, if it seems to him expedient, either with or without an application from any interested party, recommend to the Governor in Council the appointment of some person or persons as commissioner or commissioners under the provisions of the *Inquiries Act* to inquire into the dispute, strike or lockout, or into any matters or circumstances connected therewith. (1918, c. 27. Am. 1920, c. 29.)

R.S., c. 104.

Minister may order inquiries into industrial matters.

63B. The Minister, where he deems it expedient, may, either upon or without any application in that behalf, make or cause to be made any inquiries he thinks fit regarding industrial matters, and may cause such steps to be taken by his department and the officers thereof as seem calculated to secure industrial peace and to promote conditions favourable to settlement of disputes. (1918, c. 27.)

## MISCELLANEOUS

64. No court of the Dominion of Canada, or of any province or territory thereof, shall have power or jurisdiction to recognize or enforce, or to receive in evidence any report of a Board, or any testimony or proceedings before a Board, as against any person or for any person, except in the case of the prosecution of such person for perjury.

Courts not to recognize reports of or testimony before a Board, except in prosecutions for perjury.

65. No proceeding under this Act shall be deemed invalid by reason of any defect of form or any technical irregularity.

Technicality not to invalidate proceedings.

66. The Minister shall determine the allowance or amounts to be paid to all persons other than the members of a Board, employed by the Government or any Board, including the Registrar, secretaries, clerks, experts, stenographers or other persons performing any services under the provisions of this Act.

Payment of services under Act.

67. In case of prosecutions under this Act, whether a conviction is or is not obtained, it shall be the duty of the clerk of the court before which any such prosecution takes place to briefly report the particulars of such prosecution to the Registrar within thirty days after it has been determined and such clerk shall be entitled to a prescribed fee in payment of his services.

Prosecutions under Act to be reported to Registrar.

68. The Governor in Council may make regulations as to the time within which anything hereby authorized shall be done, and also as to any other matter or thing which appears to him necessary or advisable to the effectual working of the several provisions of this Act. All such regulations shall go into force on the day of the publication thereof in *The Canada Gazette*, and they shall be laid before Parliament within fifteen days after such publication, or, if Parliament is not then in session, within fifteen days after the opening of the next session thereof.

Minister may make, alter and amend regulations.

69. All charges and expenses incurred by the Government in connection with the administration of this Act shall be defrayed out of such appropriations as are made by Parliament for that purpose.

Expenses.

70. An annual report with respect to the matters transacted by him under this Act shall be made by the Minister to the Governor General, and shall be laid before Parliament within the first fifteen days of each session thereof.

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## **APPENDIX B**

### **Summary Tables Respecting Proceedings Under the Industrial Disputes Investigation Act, 1907**





## SUMMARY TABLES RESPECTING PROCEEDINGS UNDER THE INDUSTRIAL DISPUTES INVESTIGATION ACT, 1907

The tables here presented are arranged in several divisions, viz.: (1) showing proceedings by industries concerned from March 22, 1907, to March 31, 1924; (II) showing by fiscal years, 1907-1924, number of disputes dealt with; and (III) showing by calendar years 1907-1924, number of disputes dealt with.

I.—TABLE SHOWING PROCEEDINGS BY INDUSTRIES FROM MARCH 22, 1907, TO  
MARCH 31, 1924

Industries affected	Number of applications for Boards received	Number of strikes not averted or ended
<b>I. Disputes affecting mines, transportation and communication, other public utilities and war work—</b>		
(1) Mines—		
(a) Coal.....	68	10
(b) Metal.....	20	5
(c) Asbestos.....	1	0
(2) Transportation and communication—		
(a) Railways.....	188	7
(b) Street railways.....	102	7
(c) Express.....	11	1
(d) Shipping.....	32	0
(e) Telegraphs.....	17	1
(f) Telephones.....	7	0
(3) Miscellaneous—		
(a) Light and power.....	22	3
(b) Elevators.....	1	0
(4) War work.....	30	1
<b>II. Disputes not falling clearly within the direct scope of the Act.....</b>	<b>120</b>	<b>2</b>
<b>Total.....</b>	<b>619</b>	<b>37</b>

II.—TABLE SHOWING BY FISCAL YEARS, 1907-1924, NUMBER OF DISPUTES DEALT WITH

—	1907- 1908	1908- 1909	1909- 1910	1910- 1911	1911- 1912	1912- 1913	1913- 1914	1914- 1915	1915- 1916	1916- 1917	1917- 1918	1918- 1919	1919- 1920	1920- 1921	1921- 1922	1922- 1923	1923- 1924	Total
Number of appli- cations.....	34	21	27	24	18	21	16	16	14	36	52	95	72	63	49	39	22	619
Number of Boards granted.....	31	19	25	19	15	17	15	17	11	20	38	60	46	37	31	27	13	441
Number of dis- putes where strike not avert- ed (or ended)....	1	1	4	4	4	4	0	1	1	1	1	2	3	6	1	3	0	37

III.—TABLE SHOWING BY CALENDAR YEARS, 1907-1924, NUMBER OF DISPUTES DEALT WITH

—	1907* 9 mos.	1908	1909	1910	1911	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	1923	1924† 3 mos.	Total
Number of applications...	25	27	22	28	21	16	18	18	15	29	53	93	70	61	54	42	22	5	619
Number of boards granted	22	25	21	23	16	16	15	18	12	16	37	59	47	41	26	29	17	1	441
Number of disputes where strike not averted (or ended).....	1	1	4	4	4	3	1	1	1	1	1	2	3	5	2	2	1	0	37

\*The Act became law on March 22, 1907, so that the proceedings cover nine months only.

†To the end of the financial year, March 31.





**APPENDIX C**

**Text of Sections 91 and 92 of the British North  
America Act, 1867**





# BRITISH NORTH AMERICA ACT, 1867

## TEXT OF SECTIONS 91 AND 92

### *Powers of the Parliament*

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

Legislative  
Authority of  
Parliament of  
Canada.

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the



Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

*Exclusive Powers of Provincial Legislatures*

Subjects of  
exclusive  
Provincial  
Legislation.

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes,—
  - a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
  - b. Lines of Steam Ships between the Province and any British or Foreign Country:
  - c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

**APPENDIX D**

**Government Intervention in Labour Disputes in  
Canada**

By

**MARGARET MACKINTOSH,  
(Librarian, Department of Labour)**

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## GOVERNMENT INTERVENTION IN LABOUR DISPUTES IN CANADA

Concerted action on the part of workmen to better their conditions was prohibited in Britain till the early part of the nineteenth century and until later in Europe. Legislation designed to prevent or settle disputes arising from such action dates from about the middle of the century and was based on previous experience in dealing with individual disputes or in promoting collective bargaining. Most of the laws providing for conciliation and arbitration in industrial disputes have been developed from the old French system of *Conseils des Prud'hommes* which was created under the Napoleonic code and became the recognized method of settlement of all differences between employers and individual employees not only in France but in Germany, Belgium and other countries, and from the voluntary joint committees which had grown up in the English cotton and hosiery industries as machinery for the collective bargaining permitted after the repeal of the Combination Acts. An extension of state action took place when a government official acted in the capacity of mediator when requested to do so by the two parties to the dispute. To these purely permissive forms of conciliation and mediation, state intervention at the request of one party only was added, but the means adopted were still conciliatory, an informal attempt being made to bring the parties together. Arbitration, or the bringing in of an adjudicator, when conciliation failed, was the next step, both parties agreeing to submit their differences to one or more arbitrators, or to a committee composed of one or more representatives of the employer together with an equal number representing the workmen and a chairman with whom the ultimate decision usually rested. When the parties refused to agree to arbitration, an inquiry might be held by an independent tribunal and the findings made public. Failing both voluntary conciliation and a joint agreement to submit to arbitration, reliance was placed on the influence of public opinion, when informed as to the dispute by the report of the investigating body, to effect a settlement without a serious dislocation of business. In the majority of the older industrial countries, laws for the settlement of industrial disputes have not gone beyond this stage.

In the newer countries, Australasia, the United States and Canada, to the merely permissive character of the older legislation regarding strikes and lock-outs was added a coercive element. Compulsion in industrial arbitration may be applied at either of two points: there may be compulsion to refer a dispute to arbitration before a stoppage of work and there may be compulsion in the application of the award. In Australasia, compulsory arbitration is the general rule, strikes and lockouts being forbidden, disputes having to be submitted to the state or federal courts of arbitration and the awards being enforced. In the United States, the operation of inter-state railways is within the scope of a law requiring investigation but strikes are not prohibited. In Colorado, there is a compulsory investigation Act modelled on the Canadian law and in Kansas compulsory arbitration in industries "affected with a public interest" was provided for by a statute of 1920.

In Canada, a distinction has been drawn between what may be termed "private" industries and those industries in which the community has such an immediate interest that public opinion has demanded that there should be no cessation of the operation of such industries till all means of conciliation have been exhausted and the public has been informed as to the merits of the dispute. The law covering these industries does not provide for a compulsory award as in Australia and New Zealand but it does provide for compulsory investigation, the right to strike or lockout being restricted pending a report by the investigating body after which both parties are free to accept or reject the award.

Statutory provision of machinery for the settlement of labour disputes in Canada was made first by the provinces, Ontario, Nova Scotia, British Colum-



bia and Quebec, enacting laws providing for conciliation and arbitration of one form or another, but few of these provincial laws met with any degree of success and the Dominion Parliament entered the field by enacting the Conciliation Act in 1900. Later Acts were passed by Ontario, Manitoba and Quebec, the latter being a compulsory investigation law applicable to municipal employees within the province.

In this discussion of Canadian laws on industrial disputes, the provincial statutes are considered first in the chronological order of the earliest enactment in each province followed by the three Dominion laws.

#### ONTARIO

The first Canadian legislation dealing with industrial disputes was an Ontario enactment of 1873<sup>1</sup> almost identical with a British enactment of 1867, providing for local boards of conciliation to be established on agreement between employers and workmen but restricting the scope of the boards to disputes not involving any question of wages. It was still considered an unjustifiable interference with the freedom of contract as established by the repeal of the Statute of Apprentices in Britain in 1814 to allow any outside agency to deal with wages. "Inasmuch as ninety-five one-hundredths of the disputes which arise between the employer and employee relate to the rate of remuneration, it is difficult to see what object it was hoped to achieve by an arbitration act containing such a section."<sup>2</sup> Like its model, the Canadian Act was a dead letter and remanded so even after its amendment in 1890 to permit boards formed by joint agreement to establish rates of wages. In 1911, the law was repealed as obsolete.

In 1894, Ontario passed an Act<sup>3</sup> adapted from a statute enacted in New South Wales in 1892. Provision was made for councils of conciliation of four members nominated by the parties to the dispute after application by one or both parties to the registrar for the appointment of a council. Two councils of arbitration were to be appointed on the nomination of employers and employees for a term of two years, one council to have jurisdiction in railway labour disputes and the other to deal with disputes in other industries. Reference to the council of arbitration was to be made by joint agreement of the two parties or by one party after failure of a conciliation council or refusal of the second party to submit the case to a council of conciliation. An arbitration award was to be binding only by joint consent of the disputants.

In accordance with the Act, the councils of arbitration were duly appointed but no dispute has ever been referred to the council for railway labour disputes and in only one case was application made to the other council for arbitration. A tailors' union in Toronto applied for action by the council in 1896 but the employers refusing their consent to arbitration, the result was an abortive investigation by the council. This failure of the law led to an amendment in 1897 which required the council of arbitration to communicate with the parties involved in a dispute and to endeavour to effect a settlement by mediation. Information regarding a dispute was to be sent by the mayor of the municipality concerned to the registrar. The amendment provided further that the Lieutenant-Governor in Council might appoint the council of arbitration directly - nominations were not forthcoming from the employers or employees. These clauses extended the Act beyond the purely permissive character of the original enactment but increased the facilities for conciliatory methods rather than the provision for arbitration. Subsequent to this amendment, two disputes were settled by the intervention of a member of the council in the capacity of mediator.

A further development in the direction of mediation was made in 1902 by an amendment which empowered the registrar under the Trades Disputes Act

<sup>1</sup> R. S. Ont., 1897, c. 159.

<sup>2</sup> Canada, Royal Commission of Labour and Capital, 1889, p. 95.

<sup>3</sup> R. S. Ont., 1914, c. 145.

(the Secretary of the Bureau of Labour after its formation in 1900) to act as mediator when requested to do so by one party to the difference or by the mayor of the municipality concerned. The reports of the Bureau of Labour for the years 1902-04 enumerate thirty-one disputes in which the registrar intervened but no information is given as to the results of this action. The Act was consolidated in 1910 but no operations under it have been reported since 1904.

In 1906, the Ontario legislature passed the Ontario Railway and Municipal Board Act<sup>4</sup> which contained a section enabling the board to investigate and determine matters in dispute between any steam or electric railway company and its employees when requested to do so in an application containing an agreement to accept the award of the board and to continue work during the investigation. It was provided, also, that when a strike occurred or was threatened, the board should act as mediator. In the event of failure in this direction and if the general public were likely to suffer injury or inconvenience with respect to food, fuel or light, power or the means of communication or transportation or in any other respect, the board was authorized to proceed of its own motion to investigate the facts bearing on the dispute and to make its findings public. In 1913 the scope of the Act was extended to include public utilities.

Employers and workmen engaged in the operation of railways and public utilities in the province of Ontario have recourse either to the Ontario Railway and Municipal Board or to the federal Department of Labour for aid in the settlement of labour disputes, the former providing machinery for voluntary conciliation backed by authority under the Ontario Railway Act to take over the operation of any railway if services are suspended and the latter requiring investigation before a suspension can take place and providing means of investigation and conciliation. The annual reports of the Railway and Municipal Board for the years 1906-1922 refer to five strikes in which the board intervened, all of these being disputes between electric railway companies and their employees. In the case of the strike on the Sandwich, Windsor and Amherstburg Railway in 1919 and the London street railway strike in 1920, the board took control and operated the railways for periods of 14 and 358 days respectively. In four of the disputes adjusted by the board, the principal point of conflict was a demand for an increase in wages and in the fifth case, the complaint concerned working hours. During the period from the enactment of the Industrial Disputes Investigation Act by the federal Parliament in 1907 to March 31, 1923, there were fifty-one applications to the Department of Labour for the appointment of a board of conciliation and investigation in connection with disputes between electric railway companies in Ontario and their employees. Twenty-seven of these disputes were settled by the award of a board and in nine cases the appointment of a board was unnecessary owing to the settlement of the points at issue by further negotiation or by mediation by the department. In eleven disputes, matters were adjusted by negotiation after an award had been made but had been found to be unsatisfactory to one or other of the parties, and in four cases a strike occurred after the findings of the board had been published.

#### NOVA SCOTIA

To Nova Scotia belongs the distinction of having been the first legislature to impose compulsory arbitration, the Miners' Arbitration Act of 1888<sup>5</sup> providing for arbitration of disputes regarding miners' wages on the application of one or both parties, the award to be obligatory. A bill was introduced in 1887 by the Hon. W. S. Fielding, at that time Premier of Nova Scotia, but after passing the Legislative Assembly, it was defeated in the Council. The next year it was brought up again and accepted to the great satisfaction of the miners of the province as expressed at the Grand Council of the Provincial Workmen's Association. The Commissioner of Mines was empowered to decide

<sup>4</sup> R. S. Ont., 1914, c. 186, ss. 60-61.

<sup>5</sup> N.S. Stat., 1888, c. 3.



as to whether arbitration should be resorted to in case one party laid a complaint and, for this purpose, he was authorized to summon both parties and hear evidence before making a decision. The board of arbitration was to have five members, two of whom were to be appointed permanently by the Lieutenant-Governor in Council and two elected by the parties to the dispute and the fifth by the elected members jointly. If the disputants refused to nominate a member or members, the two permanent members might act alone. Authority was given to compel the production of documents and compliance with awards was to be enforced by a unique method of requiring the forfeiture of fourteen days' wages of all the employees minus the costs of arbitration to the employer or the forfeiture of an equal sum to the employees whichever party was at fault. The same forfeiture was to be required for any contravention of the prohibition of lockout or strike. In addition, awards might, on the motion of either party, be made an order of the Supreme Court and enforceable at law.

The statute of 1888 was never put in operation. In 1890, however, a new law<sup>6</sup> was enacted containing the same provisions with a few changes. The Commissioner of Mines was to be required to hear only one side of the disputes before referring the matter to arbitration. A penalty was to be imposed for refusing to name an agent to act on behalf of either party and the procedure in regard to the money forfeit was altered. Other changes were unimportant.

The reports of the Commissioner of Mines give information regarding but one case dealt with under the Miners' Arbitration Act. It is of special interest as it was connected with a similar dispute involving another company in which the Dominion Conciliation Act was invoked.<sup>7</sup> A demand for an increase in wages was made by all the miners early in 1901. The Dominion Coal Company and the Nova Scotia Steel and Coal Company on opposite sides of Sydney Harbour refused to grant an increase. The employees of the former company applied to the Commissioner of Mines for arbitration under the Act of 1890. The evidence produced led the board of arbitration to refuse the increased rates on the ground that the company was unable to pay them. The employees of the Nova Scotia Steel and Coal Company applied for assistance under the federal statute and the settlement arrived at was that rates should be increased to the same scale as that of the Dominion Coal Company.

In 1903, the Nova Scotia legislature enacted a law<sup>8</sup> for the settlement of labour disputes in any industry by means of local conciliation boards, the system being based on that provided for in the British Conciliation Act of 1896. No information regarding its operation has been published in the reports of the Provincial Secretary.

#### BRITISH COLUMBIA

At the present time, there is no provincial statute in force in British Columbia designed to settle labour disputes, the Labour Conciliation and Arbitration Act, 1894,<sup>9</sup> having been repealed in 1922 as obsolete.

The first attempt to deal with industrial disputes in this province was by an Act passed in 1893 which made provision for a bureau of labour statistics and for conciliation and arbitration in labour disputes. The New South Wales law of 1892 was closely copied, as it was in Ontario the following year, but the permanent councils of arbitration provided for were not established and the Act was replaced in 1894 by the Labour Conciliation and Arbitration Act. The idea of permanent councils was abandoned and provision was made for councils of conciliation to which reference of disputes might be made by joint agreement of the parties. Conciliation councils were to consist of four members representing equally the two sides and, if no agreement was reached, a joint

<sup>6</sup> N. S. Rev. Stat., 1923, c. 248.

<sup>7</sup> The *Labour Gazette*, vol. I, p. 507; vol. II, p. 21.

<sup>8</sup> N. S. Rev. Stat. 1923, c. 247.

<sup>9</sup> B. C. Rev. Stat., 1911, c. 123.

application for reference of the dispute to a council of arbitration might be made. A council of arbitration was to consist of three members, the third member being a judge of the Supreme Court of the province. By previous agreement the award might be made a rule of the Supreme Court on the application of either party. No proceedings were taken under this Act and no amendments were made to it, as in the case of the Ontario law.

### QUEBEC

The history of statutory provision for conciliation or arbitration in industrial disputes in the province of Quebec shows more activity on the part of the provincial government in the settlement of disputes than in any other province. The New South Wales law served as a model for the Quebec Act of 1901<sup>10</sup> as in Ontario and British Columbia, and in 1903 an amendment was passed similar to that in Ontario in 1902, by which the registrar was authorized to endeavour to effect a settlement by conciliation in any dispute in which he was requested to do so by the employer or the employees or by the mayor of the town concerned. A further duty was imposed on the registrar in requiring him to proffer his services as mediator without waiting for a request in writing to be made to him.

The council of arbitration for railway disputes was never established, no nominations being received for members. The council of arbitration for other than railway labour disputes was organized in March, 1902, but the inaction of the employers prevented any reference of disputes under the Act until after the amendment of 1903 except in one instance, the only one in which the provision for conciliation councils was utilized. The reports on the operation of the Act state that the members of the two permanent councils of arbitration which were appointed in the years 1901 and 1909, were not acceptable to the workpeople, and in 1909 the law was amended to provide that councils of arbitration should be appointed in connection with each dispute to be referred to arbitration. The employer and employees between whom a difference had arisen were thus enabled to make nominations for one representative each on the council. No disputes, however, appear to have been referred to arbitration under the Act. The Clerk of Councils of Conciliation and Arbitration reports a few disputes each year in which he has intervened as a conciliator, his efforts being successful in many cases. In 1907 the two parties to a dispute agreed to refer the matter to arbitration but preferred to do so under the provisions of the new federal Act of that year rather than under the provincial law.

In 1921, the Quebec legislature passed, and amended in 1922, the Municipal Strike and Lockout Act,<sup>11</sup> dealing with disputes between any municipal authority and policemen, firemen, waterworks employees, or men employed in connection with the removal of garbage, if at least 25 persons are employed in any one of these classes. The subject in dispute must be wages, hours of labour or discrimination against members of a trade union. This statute provided for compulsory reference to a board of arbitration and prohibits under penalty strikes or lockouts or the inciting to strike or lockout before the dispute is submitted to a board of arbitration. There is no enforcement of the award and the procedure follows closely that laid down in the federal Industrial Disputes Investigation Act. The Act has met with the approval of organized labour, the Trades and Labour Congress of Canada at its 1922 session adopting a resolution in favour of an amendment extending the scope of the Quebec law to all classes of provincial and municipal employees and of similar enactments by other provinces.

Up to June 30, 1923, this statute had been invoked on four occasions,<sup>12</sup> the employees making application for the appointment of a board of arbitration

<sup>10</sup> Que. R. S., 1909, Arts. 2489-2520; amended 1909, c. 32.

<sup>11</sup> Que. Stat., 1921, c. 46; amended 1922, c. 40.

<sup>12</sup> Que., Annual Reports of Minister of Public Works and Labour, 1921-23.



in each case. Policemen and firemen in the city of Quebec, policemen in Hull and policemen in Montreal were the employees concerned. In three cases, the award was accepted; in the case of the Hull firemen, the decision was not unanimous. In the Montreal case,<sup>13</sup> the city applied for a writ of injunction to restrain the board of arbitration from dealing with the matter on the ground that the requirements of the law had not been fulfilled in connection with its appointment. By a judgment rendered on April 28, the injunction was refused with costs against the city and the board proceeded with the hearing, issuing an award accepted by both parties.

## MANITOBA

Before 1919, no legislative action had been taken in Manitoba to deal with labour disputes but the secretary of the Bureau of Labour states in his report for the year ending November 30, 1919: "Although no power to deal with labour disputes has actually been vested in the bureau, the services of the secretary have frequently been sought in this connection and during the past four years he has participated in negotiations for settlement on many occasions. It is gratifying to note that in the majority of cases, amicable settlements have been arrived at."

In March, 1919, the Industrial Conditions Act<sup>14</sup> was enacted, providing for a Joint Council of Industry composed of five persons to hold office during the pleasure of the Lieutenant-Governor in Council. Employers' and employees' organizations were given the right to nominate two members each and the fifth member was to be an "impartial" person. In addition to powers given the council in regard to holding inquiries into the cost of living, wages, employment and unemployment, general working and housing conditions, unreasonable profits and other matters of industrial interest, the council was authorized to act as a board of arbitration at the request of the parties to the dispute and was given power to enforce the attendance of witnesses and the production of documents, etc. The original statute provided for investigation by the council of any industrial dispute, complaint regarding which had been made to the council. The amendment of 1920 makes provision for the submission of disputes between employers and workmen as to the method or terms and conditions of individual or collective bargaining to the Joint Council of Industry for investigation, a report to be made with all reasonable dispatch. There being no compulsory reference of disputes to the council and no enforcement of awards, the law is purely permissive.

The Industrial Conditions Act was not in operation till 1920, the delay being ascribed to the refusal of labour to nominate representatives on the Joint Council of Industry. The amendment in 1920 recognized the right of employers and workmen to organize and to bargain collectively, and the council was thereupon organized, the first meeting being held on May 12, 1920. Rev. Charles W. Gordon, D.D., was appointed chairman. The report of the council for the period ending November 30, 1922, states that ninety-one industrial disputes were dealt with, of which forty-five were settled on the basis of the council's decision, twenty-seven were settled by negotiation and fourteen were settled in conference with the chairman. In two cases, the findings of the council were rejected and two cases were still pending at the time the report was issued. In eleven cases, the two parties requested the council to arbitrate between them, agreeing to abide by the decision given.

There was some criticism of the Act and its operation, notably during the sessions of the legislature of 1922, and the appropriation for the following year was so reduced as to make the Act inoperative.

<sup>13</sup> Ibid., 1922-23.

<sup>14</sup> Man. Stat., 1919, c. 43; amended 1920, c. 57.

## DOMINION LEGISLATION

In 1886, the Dominion Government appointed a Royal Commission on the relations of Labour and Capital in Canada and specific direction was given the commission to inquire into and report on "the practical operations of courts of arbitration and conciliation in the settlement of disputes between employers and employed and on the best mode of settling such disputes."<sup>15</sup> The report of the commission, submitted in 1889, recommended the establishment of permanent local boards of conciliation combined with a central board whose members might be officers of the Bureau of Labour proposed by the commission, the idea of the central board being taken from the system of state arbitration in existence in the states of Massachusetts and New York. The principles underlying the proposed law were conciliation by voluntary boards if so desired, mediation by a member of the central board, or arbitration by either a local or central board, an appeal to lie to the central board if the decision of the local body were unsatisfactory. Decisions of the central body were to be "final and conclusive and to have the same effect as a decision given by any court of record."<sup>16</sup>

## CONCILIATION ACT, 1900

No bill appears to have been drafted on the basis of these recommendations and it was not until 1900 that the Conciliation Act<sup>17</sup> was passed providing for a Department of Labour for the collection and publication of labour statistics and conferring on that department the same functions with reference to conciliation and arbitration that had been assigned in Britain to the Board of Trade by the Conciliation Act of 1896.<sup>18</sup> The Minister of Labour was empowered to inquire into the cause of any industrial dispute, to arrange a conference between the parties to the dispute, to appoint a conciliator or board of conciliation at the request of either employer or workmen or to appoint an arbitrator on the application of both parties to the difference. In the event of special difficulty in determining the causes of the dispute and at the request of one or more members of a conciliation board, the Governor in Council might appoint a commission under the Inquiries Act to conduct an investigation under oath. The law made provision also for the registration of private boards of conciliation or arbitration but no use was ever made of this section.

The Act is, therefore, one of voluntary conciliation, no coercive element entering into it. Like its British model, however, it has been of great service in effecting settlements of disputes before a stoppage of work has occurred and in composing differences which have resulted in a strike or lockout, but the great bulk of the work accomplished under the Act is unknown to the general public. Lord Askwith, who was connected with the operation of the British statute almost from the date of its enactment till 1919, writing in 1921, made this statement: "The Act did little more than declare that the Board of Trade could make inquiry or send an appointed officer to see the parties, with the slight protection that officer might have by being able to say that he was acting under a statute, if the right to inquire was challenged. . . . It may be that its practical use will continue when more novel enactments have been scrapped, but it will, at least, be always remarkable as the very slight legislative base upon which all the conciliation and arbitration work done by the Government, with the wide extension of it carried out by associations of employers and trade unions, was administered from the year 1896 until the passing of the Munitions of War Acts in 1915."<sup>19</sup> A similar statement might be made with regard to the Canadian Conciliation Act with some modification to include the four cases in which the Railway Labour Disputes Act, 1903, was utilized and the operation of the Industrial Disputes Investigation Act, 1907, which will be discussed later.

<sup>15</sup> Can. Royal Commission on Labour and Capital, Report, 1889, p. 3.

<sup>16</sup> *Ibid.*, p. 97.

<sup>17</sup> Can. Stat., 1900, c. 24.

<sup>18</sup> Gt. Br. Stat., 1896, c. 30.

<sup>19</sup> Askwith, Lord, *Industrial Problems and Disputes*, N.Y., 1921.



The reports of the Department of Labour for the years 1901 to 1908 refer to forty-two disputes in which the intervention of the department was sought. In the years 1916 to 1922, "the more important disputes in which mediation work" was done by the department under the authority of the Conciliation Act numbered 506. During this period the department employed five officers, stationed at Montreal, Ottawa, Toronto, Calgary and Vancouver, who were specially charged with the work of conciliation. In addition, other officers of the department were called on frequently to act the part of peacemaker. "There is no aspect of affairs in which the adage, a stitch in times save nine, applies more forcibly than in the case of industrial disputes. In the great majority of the disputes, which have become known to the department in their earlier stages, it is found possible to secure an adjustment without a strike. There is a growing tendency on the part of employers, as well as of workmen, to invite the service of a departmental officer before a break in working relations. Experience is of the highest value in conciliation work and many a dispute which has perplexed and baffled employers and work-people alike, is solved by the appearance at an opportune moment of an officer who has frequently encountered previously the same or a similar situation and whom both sides, though not always without hesitation on the part of one party or the other, accept as mediator."<sup>20</sup>

The services of the Department of Labour appear to have been entirely mediatory, no conciliation or arbitration boards having been formed under the Act. In this connection, a second quotation from Lord Askwith is pertinent: "In fact, intervention or settlement of labour disputes requires selection of an exact moment for action, complete and speedy grasp of the real causes of the dispute and the technicalities of the points at issue, speed and experience in judging the characters, sayings and real views of the individuals on either side, both in and out of the conference room. Committees are singularly inept bodies for these purposes. They may be suitable as arbitration courts but very seldom as conciliation courts."<sup>21</sup>

#### RAILWAY LABOUR DISPUTES ACT, 1903

In 1902, a bill<sup>22</sup> was introduced in Parliament by the Minister of Labour to provide for compulsory reference of railway labour disputes to a permanent provincial or Dominion board of conciliation and arbitration for award, adherence to which was to be compulsory on penalty of a fine. A breach of the prohibition of strike or lockout was to be punished by a fine based on the amount of wages payable during the period concerned. Disputes on inter-provincial railways were to go before the Dominion Board. This proposed legislation seems to have been based partly on the New Zealand law and partly on the Miners' Arbitration Act of Nova Scotia. It was very different in character from the Conciliation Act of 1900 in its coercive features and in its application to one class of labour only. Realizing the importance of a cordial attitude on the part of the employers and the employees to any law for the settlement of industrial disputes, the Minister of Labour stated in Parliament that the bill had been brought forward as a basis of discussion and would not be pressed at that session. A strike of the trackmen employed by the Canadian Pacific Railway which lasted about two and a half months in 1901 had shown the desirability of greater statutory authority in the matter of disputes affecting such an important utility as transportation.

Prior to the introduction of this bill, one of the planks in the platform of principles laid down by the Trades and Labour Congress of Canada had been "compulsory arbitration of labour disputes." At the congress held in September, 1902, a resolution changing this plank to "voluntary arbitration of labour disputes" was adopted as was also a resolution protesting against the proposed

<sup>20</sup> Report of the Deputy Minister of Labour, 1918-19, p. 8.

<sup>21</sup> Askwith, p. 82.

<sup>22</sup> *Labour Gazette*, vol. II, p. 769.

bill, the railroad brotherhoods having shown themselves strongly opposed to the measure. It is noteworthy that the same congress approved the reintroduction of a bill of the previous session to amend the Conciliation Act to give the Minister of Labour power to appoint a conciliator or board of conciliation of his own motion and, further, to appoint a board of arbitrators on the application of one party rather than both parties as required by the Act. The railroad brotherhoods who protested so strongly against the adoption of compulsory arbitration had organized a conciliation board for the settlement of the trackmen's strike in 1901 and had succeeded in effecting an agreement.

In 1903, a bill<sup>23</sup> from which most of the compulsory elements had been removed, was enacted, making provisions for the prevention and settlement of disputes between railway companies and their employees by authorizing the Minister of Labour to appoint a committee of investigation and conciliation on the application of either party or at the request of a municipality concerned or at its own will. In the appointment of a committee of conciliation, nominations were to be made by the parties, but if one party refused to name a member, the Minister of Labour was given power to make the appointment without nomination. Provision was thus made against one party being able to prevent an investigation being held. Failing agreement by a conciliation committee the minister might refer the matter to an arbitration board with power to compel the attendance of witnesses, the production of documents and the taking of evidence on oath. The report of the arbitration board was to be published in the *Labour Gazette* and the weight of public opinion was counted on to bring sufficient pressure to bear on the parties to cause them to reconcile their differences in accordance with the board's findings.

The Annual Report of the Deputy Minister of Labour for the fiscal year, 1902-03, refers to the Act as "carrying as far as possible the principle of voluntary conciliation but substituting for a compulsory arbitration, with its coercive penalties, the principle of compulsory investigation and its recognition of the influence of an informed public opinion upon matters of vital concern to the public itself."<sup>24</sup>

The provision for committees of conciliation and investigation by the Railway Labour Disputes Act has been utilized on only four occasions and in all but one case reference had to be made later to arbitration—in 1904 in a dispute between the Grand Trunk Railway Company and its telegraphers;<sup>25</sup> in 1907, and 1908, in disputes involving freight-handlers on the Intercolonial Railway,<sup>26</sup> and in 1921 in a dispute between members of the Canadian Brotherhood of Railroad Employees and the Canadian National Railways.<sup>27</sup> The first of these cases, that of 1904, was, however, the only one in which the prohibition of strike and lockout pending enquiry as laid down in the law of 1907, did not apply.

The Conciliation Act, 1900, and the Railway Labour Disputes Act, 1903, were consolidated in 1906 as the Conciliation and Labour Act, 1906.<sup>28</sup>

#### INDUSTRIAL DISPUTES INVESTIGATION ACT, 1907

Of all the Canadian enactments regarding conciliation and arbitration in labour disputes, the Industrial Disputes Investigation Act<sup>29</sup> has aroused by far the most comment in Canada and has been the subject of frequent inquiry from other countries. The principles of compulsory investigation and of reliance on public opinion as a court of final appeal which formed the basis of the Railway Labour Disputes Act were applied in the later law with an additional coercive element in the prohibition of strike or lockout till after investigation and a further distinction between industries of immediate public interest and

<sup>23</sup> Can. Stat., 1903, c. 55.

<sup>24</sup> p. 59.

<sup>25</sup> *Labour Gazette*, vol. 5, pp. 735, 869, 874.

<sup>26</sup> *Ibid.*, vol. 8, p. 289; vol. 9, pp. 500-504.

<sup>27</sup> *Ibid.*, vol. 21, pp. 1351-1466.

<sup>28</sup> Can., R. S., 1906, c. 96.

<sup>29</sup> Can. Stat., 1907, c. 20; amended 1910, c. 29; 1918, c. 27; 1920, c. 29.



those not of such vital concern, only those engaged in the operation of public utilities and mines being within the scope of the compulsory clauses of the statute.

The Industrial Disputes Investigation Act was passed by Parliament in 1907 after a strike among the coal miners in Alberta in the previous year, causing a serious shortage of fuel in the prairie provinces, had emphasized the particular danger in disputes in certain industries. The law is limited in its main provisions to the operation of mines and public utilities employing more than ten persons, the term "public utility" being defined as the means of transportation and communication, including steam, electric and other railways, steamships, telegraph and telephone service, and the production of light, heat and power. It is declared illegal for an employer in these industries to lock out his employees or for workmen to strike prior to or during a reference of the dispute to a board of conciliation and investigation. An employer contravening the law is liable to a fine of from five hundred to one thousand dollars for each day or part of a day that a lockout exists and an employee on strike contrary to the Act is liable to a fine of from ten to fifty dollars for each day or part of a day he is on strike. A penalty is provided, also, for anyone who incites or aids any person to declare a lockout or to go on strike contrary to the law.

The statute is administered by the Minister of Labour, the Deputy Minister of Labour acting as registrar of boards of conciliation and investigation. A board is appointed by the minister, the three members being nominated, one each by the two parties to the dispute and the third by agreement between the other two or, failing agreement, by the minister. The original enactment provided that the machinery of the Act could be put in operation only on the application of one or other of the parties. An amendment of 1918 empowered the Minister of Labour to appoint a board at the request of any municipality interested or of his own motion, this amendment marking an extension of the principle that there were interested in any dispute in these industries not two parties only, but a third party, the general public claiming the right to intervene through the government. If the disputants do not come to an agreement through a board of conciliation, the latter is empowered to make recommendations looking to a settlement and the majority and minority reports are made public. Not until the report of the board has been delivered to the parties affected are they free to alter the conditions of employment with respect to wages or hours regarding which there was a dispute and thirty days' notice must be given by the party desiring the change. The Act provided, also, that if the parties agree in writing to be bound by the award, it may be made a rule of a court of record and enforceable at law.

The period, 1907-1923, the years during which the statute has been in operation, has been one of severe testing for any law of this sort. The steadily increasing cost of living, but no means a war phenomenon though the movement was greatly accelerated by war conditions, the flood of immigrants in the years prior to the war and the absorption of large numbers of them in mining communities and the lower ranks of railway and shipping labour, the fact that Canadian industries were comparatively young and the organized labour movement only beginning to gain a foothold among many classes of workers, all these conditions are important factors affecting the operation of such a statute. Criticism directed at the law has been aimed almost entirely at the fact that strikes have occurred in industries within its scope and that the penal clauses of the Act have not been enforced. Some thirteen complaints of violation of the law are reported in the *Labour Gazette* to have come before the courts; eleven prosecutions for illegal strikes or for inciting or aiding a strike, in seven of which the charge was sustained by the court; four for illegal lockouts, two employers being fined; two for the enforcement of an agreement based on an award of a board of conciliation and investigation, both of which were dismissed, and one application for an injunction to restrain the employer from reducing

wages before the matter had been dealt with by a conciliation board, which was suspended on appeal on the ground that as the agreement had expired, there were no existing rates of wages regarding which there could be a dispute. The Governments which have been in power during this period have followed the practice of leaving the enforcement of the penal provisions of the law to the aggrieved parties in the dispute and neither employers nor workmen have cared to assume the responsibility for court proceedings in more than these few cases and in no case has an effort been made to prosecute a large body of men for striking. Dr. Victor S. Clark, commissioned in 1908 and 1910 by the United States Government to investigate the operation of the Canadian law, stated in 1916: "But even though violations are seldom prosecuted, neither strikers nor employers dare defy the law of the land in disputes prominently before the public and affecting the prosperity and comfort of a large body of citizens. By doing so, they would put a powerful weapon in the hands of their opponents and they would fatally prejudice their case in the high court of public opinion."<sup>80</sup>

It is worthy of note that the framers of the statute were fully seized of the difficulties of the situation when it was defined as "An Act to aid in the prevention and settlement of strikes and lockouts in mines and industries connected with public utilities." It might be concluded from the somewhat modest claim as to the expected success of the proposed law that its sponsors realized the practical impossibility of forcing any considerable body of men in a democratic community into any line of action repugnant to them. In Australia, one method of enforcing compliance with the arbitration laws is to deprive the trade union contravening the law of the privileges of registration and thus of the legal status conferred on it. It has been suggested that a similar practice might be followed in Canada. The number of strikes occurring in these countries in spite of such provisions shows that even the imposition of this penalty is not an effective deterrent. An analysis of the illegal strikes in Canada exposes the futility of such a proposal for a large percentage of the important strikes in industries under the Act were strikes to enforce recognition of the union by the employer and such a penalty as that imposed in Australia is only possible where the union concerned is a recognized body entitled to certain privileges which can be denied for fault. In the higher grades of railway labour, there has been general compliance with the law but the railroad brotherhoods are trade unions with a long history of orderly collective bargaining and their members are well-known citizens in each community. Very different is the case of the coal miners, particularly those in western Canada, among whom has occurred the largest number of illegal strikes. The period during which the statute has been in operation has been the period during which the coal miners have attempted to secure recognition of their union and have met with strong opposition in Alberta and British Columbia and with defeat on Vancouver island. The prolonged strike in the Nova Scotia fields in 1909-10 was concerned also with union recognition. Scattered in isolated communities made up of a large proportion of "foreigners", the coal-mining districts present a decided contrast to the city-dwelling workers in industries of public utility. Midway between these groups are the freight-handlers and longshoremen among whom the next largest number of illegal strikes has occurred.

In the administration of such an enactment as the Industrial Disputes Investigation Act, expediency must be an important consideration and an article by Mr. F. A. Acland, Deputy Minister of Labour from September, 1908, to September, 1923, contains the statement: "It has not been the policy of successive ministers under whose authority the Act has been administered to undertake the enforcement of these [penal] provisions. . . . The usefulness of the Act is, perhaps, better determined in any event, less by the negative results in situations where the parties have, regardless of consequences, stayed

<sup>80</sup> Proceedings of the American Academy of Political Science, New York, vol. 7, No. 1, pp. 15-16.



deliberately aloof from its influences and operation than by the positive results obtained in situations where the parties have, whether cordially or reluctantly, brought their difference within the scope of the Act."<sup>31</sup> In 93.9 per cent of the 597 disputes in which application was made to the department for a board of conciliation and investigation from the date of its becoming law to the end of March, 1923, strikes were averted or ended. The dispute between the Canadian railway companies and the shopcrafts in 1922 affords a striking illustration of the benefit of the Act to the general public as well as to those more immediately concerned with the dispute. The American railway companies gave notice to their shopmen of a reduction in wages and, the men opposing the decrease, the dispute was referred to the United States Railroad Labour Board. The decision of the board was for the reduction but the employees were unwilling to accept it. A nation-wide strike of railway shopmen was declared in the United States and lasted from July 1 to the end of September and "for an even longer period it partially paralyzed the transportation facilities of the nation and endangered the safety of the travelling public."<sup>32</sup> The return to work was on the basis of the board's decision. In Canada, the railways followed the example of the American companies in proposing a reduction of wages and there was opposition on the part of the shop crafts but the men observed the law and there was no strike in Canada, the dispute being dealt with by the establishment of various Boards of Conciliation and Investigation under the Industrial Disputes Act and the awards being accepted.

Provision is made in the law for the voluntary application of its machinery to disputes otherwise without its scope. In the case of threatened strikes or lockouts in mining or public utility operations, the Act may be invoked on the application of one party to the dispute or at the request of the municipal authorities concerned or at the will of the Minister of Labour, and during the war the scope of the compulsory clauses of the Act was extended by order in council issued under the authority of the War Measures Act to cover industries engaged in the production of war necessities. The reports of the Department of Labour show an increasingly large number of disputes in which a board was appointed with the consent of both parties, a fact which would seem to demonstrate the beneficent character of the Act and the friendly attitude adopted towards it by the employers and employed, since in these industries application for a board is purely voluntary and there is no restriction on the right to strike or lockout. In the first twelve years during which the law was in force, only twenty-three disputes dealt with under the Act were in industries other than mines or public utilities, or six per cent of all the disputes referred under the Act during this period, and in the last four years, forty-two disputes in other industries, or about nineteen per cent, were dealt with by joint consent. In addition, twenty-one disputes involving workmen under municipal or provincial control were referred to boards of conciliation with the consent of the employing body and the workmen in the four years 1920-23, making a total of sixty-three disputes, or twenty-eight per cent, in which the parties agreed to the appointment of a board of conciliation and investigation. Of these eighty-six disputes, in only two cases was a strike not averted or ended.

In connection with one class of workmen, some difficulty has been met by the Industrial Disputes Investigation Act in recent years, the question of jurisdiction as between the Dominion and provincial authorities arising in the case of disputes involving municipal or provincial employees. The report of the Deputy Minister of Labour for the year ending March 31, 1919, states: "When in the early days of the life of this statute, a dispute between a municipality and its employees would be brought to the attention of the department by means of an application for a board, it was the practice to establish a board of conciliation and investigation if the dispute affected any class of labour which could be regarded as a public utility; also, in the absence of any distinct

<sup>31</sup> Canadian Law Times, March, 1916.

<sup>32</sup> U. S. Monthly Labour Review, December, 1922, p. 1.

protest by the municipality on the ground of jurisdiction. In this way various municipal disputes affecting clerical workers were arranged; the question of jurisdiction was avoided rather than determined. At the same time various municipalities while not formally objecting to the establishment of a board of conciliation and investigation, for the settlement of a particular dispute, had questioned if the Act properly extended to a class of disputes in which the employer was a body created by and responsible to the government of a province."<sup>33</sup> Owing to the increased unrest of the war period, a larger number of disputes arose between municipal authorities and their employees and the matter of jurisdiction became more pressing. In 1917, employees of the Edmonton street railway, which is owned and operated by the city, applied for a board of conciliation under the Act which was duly established by the Minister of Labour. In this case, the municipality was unwilling to take any part in the proceedings and applied for a writ of injunction restraining the board from making any inquiry on the ground that no dispute existed within the meaning of the Act, those workers who had been responsible for the difficulty being no longer employed by the company.<sup>34</sup> "The injunction was not opposed by the Dominion authorities and no enquiry into the dispute took place before the board."<sup>35</sup> The question of the jurisdiction of the Dominion Parliament in disputes involving municipal employees was not specifically mentioned in this case but after its occurrence the department definitely adopted a policy of applying the Act only to disputes in which the employer was a province or municipality by joint consent of both parties to the dispute. From the close of the fiscal year, 1917-18, to March 31, 1923, twenty-one such disputes have been referred to boards of conciliation and investigation under the Act but in nine other cases the consent of the employing body to the appointment of a board was refused. Another quotation from the Report of the Deputy Minister of Labour, 1918-19, is of interest at this point: "The heads of municipalities have been by no means consistent in the attitude taken to the question of the applicability of the statute to municipal industrial disputes. For several years requests for conciliation boards came only from the employees and in no case from a municipality. The jurisdiction of the department, if questioned at all, was questioned by the municipality, but procedure under the statute was arranged by formal or informal consent of both parties. After the departmental ruling had been made that where the employer is a municipality, etc., no board will be established save by joint consent, pressing requests were received, in several cases from municipalities, that conciliation boards might be established. In two important cases such requests were received from the municipal officers of cities which had previously denied the jurisdiction of the statute. This inconsistency would have been immaterial if the employees had concurred in having the dispute referred to a board; but the employees, having in mind the treatment their application had previously received from the municipal officers, and being now aware that concurrence was optional, could not resist the temptation of imitating the previous action of the municipality and refusing concurrence, thus preventing an inquiry before a board of conciliation."<sup>36</sup>

At the present time, the question as to whether the Industrial Disputes Investigation Act is *intra vires* of the Dominion Parliament is before the courts in the case of *Toronto Electric Commissioners vs. Snider et al.* In August, 1911, the power of the federal legislature to pass this statute was challenged by the Montreal Street Railway Company<sup>37</sup> in connection with the appointment of a board of conciliation and investigation on the application of the company's employees. A temporary injunction restraining the board from proceeding with its inquiry was issued on October 27, 1911, but an application for a permanent injunction was refused by the Superior Court of Quebec on

<sup>33</sup> Report of the Deputy Minister of Labour, 1918-19, pp. 13-14.

<sup>34</sup> *Labour Gazette*, vol. 17, pp. 790, 898, 979.

<sup>35</sup> Annual Report of Deputy Minister of Labour, 1918-19, p. 14.

<sup>36</sup> *Idem*.



November 11, 1912. In a review of the case in June, 1913, the court upheld the constitutionality of the Act on the ground that the subject-matter has a general or national importance and is connected with the peace, order and good government of Canada and, therefore, with federal jurisdiction under the British North America Act. The injunction restraining the board from inquiring into the alleged dispute was made permanent, however, the court holding that the manner of appointment of the board had not fully satisfied the requirements of the statute.

Since the Montreal case, no question of the constitutionality of the Act was brought up in a court of law until the Toronto Electric Commissioners in August, 1923, applied for an injunction restraining the board of conciliation and investigation which had been appointed by the Minister of Labour on the application of the commission's employees from exercising any of the powers conferred on such a board by the Industrial Disputes Investigation Act. The grounds on which the application was based were to the effect that it was not within federal jurisdiction to apply any such Act to the employees of a municipality or to legislate on matters affecting civil rights. An interim injunction was granted by Mr. Justice Orde on August 29 and proceedings by the board were stopped, the judge taking the view that the federal Parliament could not pass legislation permitting interference with the civil rights of employers and employees or with the municipal institutions of the province in any matter not included among the subjects enumerated in the British North America Act as being within the legislative authority of the Dominion Parliament.<sup>38</sup> Application was then made by the Toronto Electric Commissioners for a permanent injunction against the board of conciliation and the case was heard by Mr. Justice Mowat, of the High Court Division of the Supreme Court of Ontario, and judgment delivered on December 15.<sup>39</sup> The application of the plaintiffs was refused, the judge holding that the matters dealt with in the Industrial Disputes Investigation Act were of "national concern" and therefore within federal jurisdiction,<sup>40</sup> but since Mr. Justice Orde and Mr. Justice Mowat had disagreed on the same point of law and were judges of co-ordinate authority, the case has been referred to one of the appellate divisions of the Supreme Court.

Involving as it does the right of a federal legislature to enact laws which are coercive in their operation in the industrial field, the question of the constitutionality of the Industrial Disputes Investigation Act naturally brings to mind similar legislation in other federal states. In Australia and in the United States, both of which countries have laws containing compulsory features, which provide for the settlement of industrial disputes, there is no constitutional difficulty in regard to the statutes now in force, the Acts in question being specifically restricted to a field which is reserved under the terms of the constitution to the federal legislature. In Australia, the Commonwealth Conciliation and Arbitration Act, 1904, and the Industrial Peace Act, 1920, cover only disputes extending beyond one state and such enactments are obviously within the limits of the constitution which includes "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state" in the list of enumerated subjects with respect to which the federal Parliament has power to legislate. The American constitution, which the Australian follows in conferring the residuary powers of legislation on the states, reserves to Congress the right to enact laws with regard to commerce between the various states of the Union. The regulation of labour engaged in inter-state commerce falls, therefore, according to judicial interpretation, within the scope of the federal authority and machinery for intervention in railway labour disputes by the United States Government has been provided

<sup>37</sup> Report of Registrar of Boards of Conciliation and Investigation, 1913-14, pp. 222-226.

<sup>38</sup> *Labour Gazette*, September, 1923, pp. 985-986.

<sup>39</sup> *Ibid.*, October, 1923, pp. 1126-1130.

<sup>40</sup> *Ibid.*, December, 1923, pp. 1452-1455.

for since 1888 when provision was made for voluntary arbitration and investigation by special tribunals of labour difficulties on inter-state railways. At the present time, the Australian system is one of compulsory reference to arbitration in the case of inter-state disputes with prohibition of strike or lockout and enforcement of awards under penalties. The American system is one of compulsory investigation of inter-state railway labour disputes, with no restriction on the right to strike or lockout and no enforcement of awards, but reliance is placed on the influence of an enlightened public opinion to restrain the desire to strike or lockout and to compel acceptance of awards. In neither country has the law been successful in eliminating strikes altogether but in both countries these statutes are to be credited with composing many differences which would have resulted, in all probability, in a stoppage of work, were it not for the machinery thus provided and the respect accorded the law by the majority of those concerned. It is impossible to estimate the value of these laws, as of the Industrial Disputes Investigation Act, in restraining employers and workpeople from permitting matters in dispute to cause a stoppage of work which the very enactment of such a statute has declared to be opposed to public opinion. Neither can formal reports on the operation of the Canadian Act give any adequate idea of the importance of the conciliation work which results in satisfactory adjustments through correspondence or mediation by an officer of the department and renders unnecessary the appointment of a board of conciliation and investigation.

Of the sixteen years since the enactment of the Industrial Disputes Investigation Act by a Liberal Government, six have been years of Conservative administration and four were years under coalition or union governments. No attempt has been made by either party to repeal the Act, and no amendments, undermining the principle of the community's right to be informed regarding a dispute in certain industries before a stoppage is permitted, have been proposed; the changes made in 1918 and 1920 only extend this principle and are designed to simplify procedure under the Act.

The attitude of the employers and workmen towards the Act appears, on the whole, friendly, the watchful and half suspicious attitude adopted at first having given way to one of co-operation in carrying out the terms of the statute and of seeking to amend it from time to time to facilitate procedure. It is to be expected that dissatisfaction with the findings of a board should occur occasionally and should colour the view taken of the statute itself for a time but as the personnel of each board of conciliation varies from another and as the nomination of members rests with the parties, the hope of a more acceptable award next time tends to allay any feeling of irritation. Since the meeting of the Trades and Labour Congress in 1918, the resolutions regarding the Industrial Disputes Investigation Act which have been adopted have been in favour of its extension to cover other classes of employees. In this connection it might be noted that in 1918, a labour man was made Minister of Labour and this precedent was followed when the Liberal party assumed office in December, 1921.

At the parliamentary session of 1923, an amendment to the Act was introduced declaring it unlawful for an employer to make any change in wages or hours before a dispute has been dealt with by a board of conciliation and imposing a penalty for such action similar to that provided in case of a lockout. The original law prohibits any change in working conditions prior to consideration by a board of conciliation but no penalty was mentioned and it was deemed desirable, therefore, to make the point clear. This amendment was adopted by the House of Commons but defeated by the Senate. The report of the Legislation Committee of the Canadian Manufacturers' Association at the annual meeting in July, 1923, states: "As this amendment was viewed with disfavour by those members interested in mining, steps were taken to oppose it in the Senate."<sup>41</sup> A further amendment was passed by the Upper Chamber to the effect that the third member of a board of conciliation and investigation, if the two other members fail to agree in nominating one, should be named by the



Chief Justice of the Supreme Court of Canada. Under the Act, the right of nomination in such event belongs to the Minister of Labour, and the argument was advanced that there was an objection on the part of some employers that the Minister of Labour as a former labour man himself would tend to appoint a person more closely associated with only one side of the dispute, a view which an examination of the facts does not appear in any way to sustain. The House of Commons took no action on the Senate amendments and the Act, therefore, remains unchanged.

Perhaps the best discussion of the principles of the Industrial Disputes Investigation Act is that by Lord Askwith in *Industrial Problems and Disputes*. As an outsider with a long and varied experience in adjusting labour difficulties and acquainted with the operation of the statute through the inquiry he was commissioned by the British Government to make in 1912, he is well qualified to comment on this statute. He says: "It has been said that the Lemieux Act (so called from Hon. Rodolphe Lemieux, Minister of Labour in 1907) is compulsory arbitration in disguise, but such a criticism could only be made by persons who have not read the Act or examined the practice under it. The Act differs essentially from compulsory arbitration. It only endeavours to postpone a stoppage of work in certain industries for a brief period and for a specific purpose. It does not destroy the right of employers or workpeople to terminate contracts. It does not attempt to regulate details of administration of business by employers, or interfere with organization of associations of employers or of trade unions. It legalizes the community's right to intervene in a trade dispute by enacting that a stoppage, either by strike or lockout, shall not take place until the community, through a Government department, has investigated the difference with the object of ascertaining if a recommendation cannot be made to the parties which both can accept as a settlement of the difference. It presupposes that industrial differences are adjustable, and that the best method of securing adjustment is by discussion and negotiation. It stipulates that, before a stoppage takes place, the possibilities of settlement by discussion and negotiation shall have been exhausted; but, and here it differs from compulsory arbitration, it does not prohibit a stoppage either by lockout or strike if it is found that no recommendation can be made which is acceptable to both sides. If no way out of the difficulty can be found acceptable to both parties, there is no arbitrary insistence upon a continuance of either employment or labour, but both sides are left to take such action as they may think fit. As a result it does not force unsuitable regulations on industries by compulsory and legal insistence, but leaves an opportunity for modification by the parties. It permits elasticity and revision, and, if it does not effect a settlement, indicates a basis on which one can be made. . . .

"It is surely true to say that the public have no use for strikes or lockouts. While the public might often have much difficulty in bringing opinion to bear in favour of acceptance or rejection of technical suggestions, which in many trades it would be impossible for persons who had not examined the questions to understand, their support to the principle that the ordeal of battle should give place to reasonable judgment would probably be emphatic and frequently effective. From the point of view of the employers, examination need not interfere with the administrative details of business or discipline, but should give better opportunity for regular and consecutive business by reducing the number of strikes, by bringing strikes to an earlier conclusion, and by the powerful effect which would result in the direction of rendering unnecessary and ineffective the progress of sympathetic strikes by which employers having no quarrel with their own workmen are so frequently disturbed."<sup>42</sup>

<sup>41</sup> *Industrial Canada*, July, 1923, pp. 127-128.

<sup>42</sup> Pp. 246-249.











